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53287



PEOPLE OF THE STATE OF ILLINOIS,) APPEAL FROM
 Plaintiff-Appellee,)
) CIRCUIT COURT,
 vs.)
) COOK COUNTY.
 RICHARD MUELLER,)
 Defendant-Appellant.) HON. FRANCIS J. DELANEY,
 Presiding.

ABST.

MR. PRESIDING JUSTICE BURKE DELIVERED THE OPINION OF THE COURT:

Defendant was found guilty at a bench trial of the crimes of burglary and deviate sexual assault, and was sentenced to a term of two years to ten years in the penitentiary on the assault conviction and to a term of one year to five years on the burglary conviction, the terms to run concurrently. (Indictments charging two counts of theft, on which the trial court found defendant guilty, were ultimately dismissed by the People.) Defendant appeals.

Nancy Lemke, eight years of age at the time of trial, testified that on July 19, 1967 she was seven years of age and was living with her parents in the family owned home on South Harding Avenue in Chicago. She stated that she went to bed about 8:00 P.M. on July 18th, sleeping in and sharing with her younger sister, Cindy, the lower bunk of a two-bunk bed; her brother, aged nine, slept on the upper bunk, and a younger sister slept in a single bed in the same room. She testified that the children's bedroom overlooked the kitchen of the home and that the parents' bedroom overlooked the dining room.

Some time during the early morning of July 19th Nancy went to the washroom, returned to her bed and fell asleep again. A few minutes later she was awakened by a person whom she recognized as the defendant. Nancy testified that defendant "pushed her over" and pulled down her panties. He then performed a deviate act upon

her sex organ, pulled up his pants and left the room. Nancy stated that the defendant remained in the room about ten minutes. After the defendant left the room, Nancy went to the doorway and peeked through the partly open door into the kitchen to see if defendant was still present. She testified that she observed her father's wallet on the kitchen table and his trousers on the kitchen floor. Nancy then called to Cindy that the latter sleep on her side of the bed.

Nancy testified that she recognized the defendant because he baby-sat with the Lemke children on two occasions prior to the incident, and that she played with the defendant's younger sister. She stated that on the date of the incident defendant had a severe case of acne on his face. She further testified that defendant resided with his family four doors from the Lemke residence. The witness spoke to her parents about the incident about 7:00 A.M. and shortly thereafter she identified the defendant as the assailant, who was in the company of a police officer.

On cross-examination Nancy testified that at the time the defendant performed the acts complained of it was just beginning to get light outside. She also stated that defendant wore a short-sleeved white shirt and gray pants, that the defendant's brother had previously sexually molested her which she reported to her mother, that her mother did not tell her what to say at trial, that Cindy saw what the defendant did to Nancy on the morning in question, and that she spoke with her mother of the incident about ten times before trial.

Cindy Lemke, aged six, stated that she too went to bed about 8:00 P.M. on July 18, 1967 and that she slept with Nancy. The first occasion she had to see defendant on the morning of July 19th was

when he was walking past the bedroom door toward the dining room. She stated that Nancy was asleep at that time. Shortly thereafter the witness observed the defendant enter the bedroom, pull her sister's panties down and perform a deviate act upon her sex organ. After defendant left the bedroom, Nancy and Cindy peeked through the partly open bedroom door and Cindy observed her father's trousers on the kitchen floor. She testified that she heard defendant going down the stairs of the rear porch of the building. Shortly thereafter her parents awoke and Nancy told Mr. Lemke that defendant was in the bedroom, to which he stated, "Maybe we've been robbed." Cindy testified that she was unable to see the sun at the time of the incident and that "it was not as bright as it is out the window today." The witness stated that she discussed the incident with her mother before testifying at trial.

Mrs. Arlene Lemke, the mother of Nancy and Cindy, testified that her children went to bed about 8:00 P.M. on July 18th, that her husband went to bed about 11:00 P.M. and that she retired about 12:30 in the morning. The witness awoke shortly before 7:00 A.M. and went to the kitchen where she observed her husband's wallet lying on the kitchen table and his trousers lying on the floor. Neither item was in that position when she retired to bed earlier, as her husband normally left his trousers in the bedroom or the washroom before retiring. Seventeen dollars was missing from her husband's wallet and twenty dollars was missing from her wallet which had been left on the kitchen range. She also observed the back door to the house was standing wide open, whereas it had been locked with a key the night before, and that the rear porch window was wide open, which had been closed the night before. Mrs. Lemke testified that her husband's electric razor and wristwatch were also missing.

The witness further testified that defendant lived with his

family on the same block as the Lemkes, that she was acquainted with defendant's mother, and that she had hired defendant as a baby-sitter on two occasions, but that she did not give him permission to enter the Lemke home on the morning in question. The police were summoned and defendant was brought to the Lemke residence shortly thereafter where he was identified by Nancy. The witness also testified that she did not speak to Nancy about ten times prior to trial concerning the incident, but that she did speak to both girls on several occasions to determine if they would relate the same version of the incident and that she also told them to tell the truth at the trial. Mrs. Lemke stated that Nancy did not relate to her a similar incident involving defendant's brother prior to the instant incident.

Chicago Police Officer Moses Zepeda testified for the People that he was summoned to the Lemke residence about 7:10 A.M. on July 19, 1967. He made a search of the premises and observed the back porch window open and a small ladder near the open window. He then proceeded to defendant's home down the block from the Lemke residence and knocked on the front door. Receiving no response the officer proceeded to the side door where his knock was answered by defendant's father. A few minutes later defendant emerged from the building and the officer asked him if he would accompany the officer to the Lemke residence. Defendant replied in the affirmative. After defendant was identified by Nancy Lemke he was placed under arrest and advised of his constitutional rights. The officer also testified that the defendant had a severe case of acne at the time of the arrest, but that the condition was not as severe at the time of trial.

For the defendant, Robert Velasquez testified that he operated a janitorial service and that he had employed the defendant. He

stated that defendant was working with him on a job on July 19, 1967 from about 2:00 A.M. until about 5:00 A.M. when he dropped defendant off at his home. The witness testified that when he dropped the defendant "it was not broad daylight, but you could see clearly." The witness did not go into the house with the defendant, nor did he know what entry way the defendant had used in entering the house.

Defendant's sister, Mary Mueller, testified that defendant knocked on her basement bedroom window about 5:00 A.M. on July 19th and that she let him into the house. Defendant proceeded to the first floor of the house and the witness went back downstairs where she prepared herself for work. She testified that she left the house for work about 6:30 or 6:45 A.M. and that defendant was in his bed when she left. She also testified that defendant had no door key to the building, necessitating another member of the family to afford him entrance.

Defendant's father testified that he awoke defendant at 2:00 A.M. on July 19th so that defendant could go to work; the witness had just returned home from his own job. He testified that he did not know what time his son returned, but that at about 7:30 A.M. a police officer came to the house and asked to see defendant. When the witness went to the defendant's room, defendant was in bed. The witness also testified that he looked for a specific wristwatch and electric shaver in his house but did not find either item.

Defendant took the stand in his own behalf and testified that he was driven to work by his employer at 2:00 A.M. on July 19, 1967. He was driven home after work by his employer between 5:00 A.M. and 5:30 A.M. and his sister let him into the house. He then washed and went to bed. The first time he saw any member of the Lemke family that day was when he accompanied a police officer to the Lemke

residence later that morning. He concluded his testimony by stating that the acne condition of his complexion was the same at the time of trial as it was at the time of his arrest. It was stipulated that defendant was nineteen years of age at the time of trial.

There was evidence introduced that a police photograph taken of the defendant at the time he entered the County Jail on the day of his arrest showed only a mild acne condition of the face. In rebuttal two police officers testified that on the date of defendant's arrest, he had a light growth of beard and an acne condition about the chin and mouth, and that the photograph did not accurately portray the acne condition on that date.

Defendant contends that the People failed to prove an essential element of the offense of deviate sexual assault, in that there was no evidence of force introduced. He argues that Section 11-3 of the Criminal Code under which he was indicted requires evidence of the use of force upon the victim, without regard to the age of the victim. Sections 11-4, 11-5 and 11-6, on the other hand, all deal with specific offenses against children, with force not being an essential element. (Ill. Rev. Stat. 1969, Chap. 38, Paras. 11-3, 11-4, 11-5 & 11-6.)

There was competent evidence that the defendant, a nineteen year old young man, entered the Lemke residence by means of an unlocked rear porch window during the early morning hours of July 19, 1967 and was observed by one of the Lemke children proceeding from the kitchen area of the home to the dining area. Shortly thereafter the defendant, who was previously known to the Lemke children as "Dickie," entered the children's bedroom and "pushed over" Nancy Lemke, aged seven, awakening her. He then pulled down her panties and proceeded to perform a deviate act upon her sex organ.

That force attended the defendant's actions under the circumstances and in light of defendant's previous association with the

Lemke family cannot be seriously denied. In *People v. Riley*, 84 Ill. App. 2d 296, defendant, an adult, was charged with the rape of a seven year old girl. The evidence showed that the defendant had been a friend of the child's family and that the child voluntarily accompanied the defendant on the date of the assault who said he was going to the store. Defendant instead took the girl to an abandoned building where he told the child to lie down on the floor after which he had intercourse with her. In rejecting the defendant's argument that the People failed to prove the crime of forcible rape, in that the child voluntarily submitted to the intercourse, the court stated at page 300:

"A seven-year-old girl cannot be expected to understand the nature of the act, let alone possess the will to resist against a friend of her parents. Force is always present in an act of intercourse between a seven-year-old female, incapable of consenting or resisting, and a thirty-one-year-old male."

The language of the *Riley* case is applicable to the circumstances of the instant case.

Defendant also maintains that the People failed to prove the offense of burglary, in that there was no proof that defendant entered the Lemke home with the intent to commit theft. We disagree.

Cindy Lemke testified that the first time she observed the defendant in the house on the morning in question he was going from the kitchen through a hallway to the dining room. The window by which the defendant secured entrance to the home was located on the rear porch of the house which was adjacent to the kitchen. Mrs. Lemke stated that her husband's trousers and wallet were left either in the parent's bedroom or the washroom. After defendant had concluded his assault upon Nancy Lemke and had left the bedroom, Nancy got out of bed to see if he was still in the house and observed her father's trousers on the kitchen floor and his wallet on the table.

Money was missing from both parents' wallets. From this evidence the trier of fact could reasonably have concluded that defendant entered the Lemke home with the intention of committing theft, which act he in fact accomplished prior to committing the assault upon Nancy. *People v. Stevenson*, 107 Ill. App. 2d 441; *People v. Underhill*, 38 Ill. 2d 245.

The case of *People v. Soznowski*, 22 Ill. 2d 540, cited by defendant in support of his contention is not in point. In the *Soznowski* case the defendant, while intoxicated and wandering aimlessly, entered the complainant's apartment and beat her. There was no evidence that the defendant had entered the apartment with the intention of committing a theft or other felony, and the reviewing court reversed the conviction. Here, defendant's intention is shown by the location of the trousers and wallet and the missing money.

Defendant next contends that the trial court improperly allowed testimony by both Cindy Lemke and Nancy Lemke that Nancy made "complaint" of the assault to her parents after the incident, since "complaint" is admissible in no case other than a rape case. He cites *People v. Smith*, 55 Ill. App. 2d 480, and *People v. Jefferson*, 109 Ill. App. 2d 301.

The testimony of Cindy, that Nancy told their parents of the incident, was brought out by defendant on his cross-examination of the witness. No motion was made to have the answer stricken, and defendant cannot now be heard to complain. *People v. Realmo*, 28 Ill. 2d 510.

With regard to the testimony of Nancy Lemke, after a series of questions relating to Mr. Lemke's wallet and trousers were asked of the witness on direct examination, she was asked whether she had spoken to her parents "about this, the next day?" Nancy answered in the affirmative. Whether the question related to the fact of the

theft or to the fact of the assault was a matter for the trier of fact. Nonetheless, defendant raised no objection to either the question or the answer, and further cross-examined Nancy as to the reason why she did not tell her parents of the incident immediately after the defendant left the house. Defendant has waived his right to complain of this matter on appeal. *People v. Williams*, 28 Ill. 2d 114; *People v. Clay*, 38 Ill. 2d 17.

Defendant contends that he was denied his constitutional right to counsel by the improper pre-trial confrontation between the defendant and Nancy Lemke in the absence of counsel, and further that the pre-trial confrontation was so unnecessarily suggestive and conducive to irreparable mistaken identification as to deny him due process of law.

No pre-trial motion to suppress was made by the defendant, and the trial court was not afforded an opportunity to pass on the point. It cannot be raised for the first time on appeal. *People v. Harris*, 33 Ill. 2d 389; *People v. Moore*, 42 Ill. 2d 73. The confrontation occurred before the defendant had been placed under arrest and before the indictments were returned against him. It has been repeatedly held that there is no constitutional requirement of counsel under the circumstances. *People v. Palmer*, 41 Ill. 2d 571; *People v. Cesarz*, 44 Ill. 2d 180.

Both Nancy and Cindy knew defendant personally prior to the day of the assault and burglary. Both testified that they knew him from the neighborhood, that he was known as "Dickie," that they played with defendant's sister, that defendant lived only four houses from the Lemke residence, and that defendant baby-sat with them on two occasions prior to the incident.

The girls also had ample time and opportunity to observe the defendant during the assault and otherwise while he was in the Lemke house. He was seen by Cindy passing through the kitchen prior to

the assault, and there was evidence that the kitchen was lighted by a night light. Both girls also had ample time and opportunity to observe the assailant in the bedroom during the assault, as is evidenced by their testimony that he had an acne condition of the face. The fact that defendant was brought to the Lemke residence after the incident had little bearing on the identification of him given at trial, as the in-court identification had an origin independent of the face-to-face confrontation on the morning of the incident. *People v. Nelson*, 40 Ill. 2d 146. The cases cited by defendant are not applicable. (See *Stovall v. Denno*, 388 U.S. 293; *United States v. Wade*, 388 U.S. 218.)

Defendant also argues that although the proper procedures were not followed in testing the foregoing questions at the trial level, this court should consider them under the "plain error" rule, citing *People v. Potts*, 74 Ill. App. 2d 301 and *People v. Mamolella*, 85 Ill. App. 2d 240. In the *Potts* case, the court on review considered a contention raised concerning the admission of the results of a polygraph test in a rape case which were stipulated to at the trial level. In reversing, the court held that the admission of the results was reversible error as the other evidence in the case was insufficient to support the conviction. The facts in the case at bar disclose no such situation.

In the *Mamolella* case, the court on review refused to consider a constitutional question which had not been raised in the trial court. The *Mamolella* case supports the People's theory in this regard.

Defendant finally contends that the evidence is insufficient to establish guilt beyond a reasonable doubt. He alludes to certain discrepancies between the testimony of the two Lemke girls and their

mother, such as the assault upon Nancy by defendant's brother, the time period in which the instant assault occurred, the number of times the matter was discussed by the girls with their mother, the condition of defendant's complexion at the time of the incident, and the like. These were matters for resolution by the trier of fact. People v. Johnson, 114 Ill. App. 2d 415. This court will not disturb a conviction unless the proof is so unsatisfactory or the evidence so implausible as to justify a reasonable doubt as to the defendant's guilt. People v. Guyton, 114 Ill. App. 2d 394. Minor discrepancies in the testimony will not render that testimony implausible. People v. Irby, 114 Ill. App. 2d 393. There was ample competent evidence to support the finding and judgment.

For these reasons the judgment is affirmed.

JUDGMENT AFFIRMED.

LYONS and GOLDBERG, JJ., concur.



No. 53311

RAYMOND WIENER,)	
Plaintiff-Appellee,	)	APPEAL FROM THE
)	
v.	)	CIRCUIT COURT OF
)	
	)	COOK COUNTY.
)	
K.C. PARKING LOT COMPANY,	)	HON. ROBERT CHAPMAN BUCKLEY
Defendant-Appellant.	)	PRESIDING.

MR. JUSTICE SCHWARTZ DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order of the trial court which vacated an order dismissing plaintiff's complaint. Defendant contends that plaintiff's petition to vacate, which was filed pursuant to Section 72 of the Civil Practice Act (Ill. Rev. Stat., ch. 110, §72 (1969)), failed to establish a sufficient basis for the relief granted.

Plaintiff has not filed a brief in this court. Although it has been held that that fact alone is sufficient to permit a reviewing court to summarily reverse the judgment of the trial court (McDonnell v. McDonnell, 97 Ill. App. 2d 303, 240 N.E.2d 438), it also has been held that the ends of justice are better served if litigation is determined according to the substantive rights of the parties and not by procedural default.. Lynch v. Wolverine Ins. Co., 126 Ill. App. 2d 192, N.E.2d ; Daley v. Jack's Tivoli Liquor Lounge, Inc., 118 Ill. App. 2d 264, 254 N.E.2d 814. We will therefore proceed to a consideration of the merits of this appeal.

The complaint was filed on March 22, 1967 and alleged the failure of defendant, K.C. Parking Lot, to return plaintiff's automobile in the same condition defendant had received it. Defendant entered an appearance, filed an answer and served notice on plaintiff's attorneys that on August 8,

No. 53311

1967 plaintiff's discovery deposition would be taken. At the request of plaintiff's attorneys the date for the deposition was continued to October 10, 1967. Prior to that time plaintiff's attorneys again sought a continuance and the deposition was rescheduled for November 21, 1967. When plaintiff did not appear on the final date set for deposition, defendant moved that the suit be dismissed. On December 4, 1967 the court entered an order striking the complaint and dismissing the suit. On April 15, 1968, more than four months later, plaintiff filed a petition under Section 72, asking the court to vacate the order of dismissal. The petition was granted and the cause set for trial.

A petition under Section 72 of the Civil Practice Act is the filing of a new action and the petitioner must allege and prove a right to the relief sought. Fennema v. Vander Aa, 42 Ill. 2d 309, 247 N.E.2d 409; Brockmeyer v. Duncan, 18 Ill. 2d 502, 165 N.E.2d 294. In the instant case the petition was supported by the affidavits of both the plaintiff and his attorney.

Plaintiff averred that each time he received notice that his deposition was to be taken, he was instructed by his attorney not to appear. Supreme Court Rule 204(2) (3) provides that service of notice of the taking of the deposition of a party is sufficient to require the appearance of the deponent. Rule 219(c) states that if a party unreasonably refuses to comply with any provision of Rules 201 through 218, the court on motion may enter such orders as are just. The plaintiff's averment that he was informed by his attorneys not to appear for deposition does not absolve him of his duty

No. 53311

to appear. Moreover, it has been held repeatedly that Section 72 was not designed to relieve a party from the consequences of the carelessness or incompetency of his counsel. Mehlenbacher v. Elgin, Joliet & E.R.R., 87 Ill. App. 2d 452, 230 N.E.2d 27; Antczak v. Antczak, 61 Ill. App. 2d 404, 209 N.E.2d 838; Matson v. Holliday, 25 Ill. App. 2d 90, 165 N.E.2d 718. The plaintiff's affidavit lacks the legal sufficiency that is necessary to support the granting of relief under Section 72.

The affidavit filed by plaintiff's attorney avers that subsequent to the dismissal of the complaint the real party in interest, Motors Insurance Corporation, filed suit against its insured Raymond Wiener for failure to cooperate, as required by his policy of insurance. Wiener's willingness to appear for deposition dates from the time he received a summons informing him of the action taken by his insurer. While that affidavit offers a plausible explanation of Wiener's failure to appear for deposition, it does not present a sufficient excuse for such failure. In order to be entitled to relief under Section 72, plaintiff is required to present matters of fact not appearing in the record which, if known to the court at the time the judgment sought to be vacated was entered, would have prevented its rendition (Glenn v. People, 9 Ill. 2d 335, 137 N.E.2d 336) and that it was through no fault or neglect of his that the grounds claimed for relief were not made to appear to the trial court. Bartolini v. Popovitz, 108 Ill. App. 2d 89, 246 N.E.2d 834; Gundersen v. Rainbow Cleaners & Laundry, Inc., 77 Ill. App. 2d 268, 222 N.E.2d 41. The attorney's affidavit shows that plaintiff deliberately failed to appear for deposition, and his present willingness

No. 53311

to appear does not establish a sufficient basis for vacating the order dismissing his complaint.

The trial court should not have granted plaintiff's petition and its order is reversed.

ORDER REVERSED

DEMPSEY, P.J. and McNAMARA, J. concur.

PEOPLE OF THE STATE OF ILLINOIS,)
)
 Plaintiff-Appellee,)
)
 vs.)
)
 DOLORES BARNES,)
)
 Defendant-Appellant.)

APPEAL FROM CIRCUIT COURT
 OF COOK COUNTY.

Hon. Sidney A. Jones, Jr.,
 Presiding.

ABST.



MR. JUSTICE GOLDBERG DELIVERED THE OPINION OF THE COURT:

In a bench trial, defendant, Dolores Barnes, was found guilty of murder. She was sentenced to a term of fourteen to sixteen years. The single point raised on appeal is that the evidence did not prove guilt beyond a reasonable doubt.

The deceased, Gloria Grant, died as a result of a single bullet wound in the chest. Deceased and defendant were both patrons of a tavern at 1725 West Madison Street in Chicago. Defendant conceded in her own testimony that she entered the tavern with a loaded pistol concealed in her pocketbook. It is also uncontroverted that the bullet which killed the victim came from this weapon. Posterity would not be aided by preservation of the evidence in detail in this opinion. A brief summary is sufficient.

The deceased was attending a birthday party in her honor. She went behind the bar for ice and water. Defendant and a male companion were seated at the bar, close to one end. There is evidence of a bump or some physical contact between deceased and defendant. There is also evidence that defendant called deceased; and that, when deceased turned in response, the shot was fired. The evidence for the People is that immediately thereafter defendant replaced the gun in her purse and fled from the scene.

Defendant testified that deceased tripped and fell or that she stumbled and that deceased then attacked defendant with a beer bottle. Defendant opened her purse and took out the gun. The bartender then struck defendant's arm and the pistol discharged. This version of the incident is partly corroborated by defendant's male companion but it is also contradicted. The bartender testified that as soon as he saw the pistol in defendant's hand he "hit the floor".

Counsel for defendant have pointed out various contradictions in the testimony. For example, three witnesses testified that defendant entered the tavern about 6:30 P.M. and remained until the shooting occurred about 10:30 P.M. On the contrary, three other witnesses testified that defendant entered the tavern only shortly before the fatal shot was fired. There is testimony that defendant gave the gun to her male companion before she fled. There is also testimony that defendant replaced the gun in her purse before she ran from the scene. Collateral details of this type are merely discrepancies which cannot be elevated to the status of a reasonable doubt. People v. Huff, 29 Ill.2d 315, 320; People v. Boney, 28 Ill.2d 505.

Unfortunately for the contentions raised by diligent counsel for defendant, this case is far different from cited situations in which a reasonable doubt is created by means of proof of good character (People v. Dawson, 22 Ill.2d 260, 263, 264); by lack of corroboration except for the testimony of a minor of tender years (People v. Williams, 414 Ill. 414, 417); by a situation in which the testimony of the complaining witness is inherently improbable (People v. Buchholz, 363 Ill. 270, 277, 278); by complete absence of proof of an indispensable element of the offense (People v. Bissett, 246 Ill. 516, 521; People v. Bartley, 263 Ill. 69, 75); by the fact that some of the testimony was inherently false (People v. Thomas, 272 Ill. 558, 566); by the fact that the evidence is purely circumstantial (People v. Ahrling, 279 Ill. 70, 80); or by the fact that the homicide resulted from a mutual affray with grave errors in the instructions to the jury (People v. Jones, 313 Ill. 335, 344).

The record abundantly supports the finding of guilt beyond a reasonable doubt. In such a situation, where the trier of fact must arrive at his decision after weighing the credibility of the witnesses, this court may disturb the result only, "where the evidence is so unsatisfactory as to leave a reasonable doubt of the

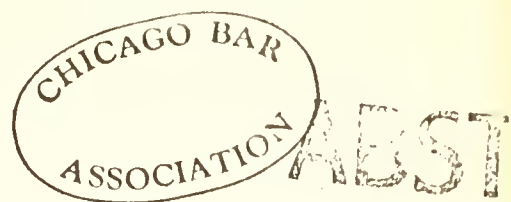
defendant's guilt". People v. May, 46 Ill.2d 120, 125. Review of this conviction must be in accordance with the long established principle that a court of review may not substitute its judgment for that of the trier of fact simply because the evidence is conflicting but only where "the evidence is so improbable or unreasonable as to leave a reasonable doubt of defendant's guilt". People v. Rush, 126 Ill.App.2d 136, 143; People v. Lawrence, 126 Ill.App.2d 202, 206; People v. Graham, 127 Ill.App.2d 272, 277; People v. Hutchins, 127 Ill.App.2d 296, 304. Also see People v. Rodriguez, 129 Ill.App.2d 1, 8 and People v. Parker, 120 Ill.App.2d 71, 78 which apply the same principle to defendant's claim of self-defense.

A careful review of the entire record and of all authorities cited impels us to conclude that the evidence proved defendant guilty beyond a reasonable doubt so that the judgment of the Circuit Court of Cook County must be affirmed.

JUDGMENT AFFIRMED.

BURKE, P.J., and LYONS, J. concur.

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT



MARTHA H. SMOLA,	)	Appeal from the Circuit
	)	Court of Cook County,
Plaintiff-Appellee,	)	Illinois, County
	)	Department, Chancery
vs.	)	Division.
)	
JOSEPH LACIC, Special Administrator)	
of the Estate of JOHN LACIC, Deceased,)	
MARTHA BROZOWSKI, THE PIONEER TRUST)	
AND SAVINGS BANK, an Illinois)	
Corporation, as Trustee under Trust)	
No. 10051,)	
	)	Honorable
Defendants-Appellants.	)	Nathan Cohen
	)	Judge Presiding

RYAN, pJ

This is a suit by a widow to set aside a land trust alleged to be in fraud of her marital rights.

The plaintiff, Martha Smola, was a widow with two children at the time she was introduced to Albert Smola, a bachelor, in 1949. They dated from then on. Albert Smola told acquaintances in about 1952 or 1953 that he had asked Martha to marry him and she put him off. She had a couple of children in school and she wanted to see them finish their education. At a picnic in 1954 Albert Smola again told an acquaintance that he was trying to convince Martha to marry him. At a Polish function, known as the Red and White Ball, in the month of February, 1955, at a table of ten, Albert Smola said "I finally got Martha to agree to marry me", and Martha was congratulated. Another witness, who was not present at the Red and White Ball of 1955 had a conversation with Albert Smola at the end of February or beginning of March, 1955 in which Albert Smola said that he had finally convinced Martha to marry him but that they had not fixed the date.

On March 19, 1955, Albert Smola conveyed the apartment property which he had owned since 1931 and in which he lived in trust to the Pioneer Trust and Savings Bank as trustee. He reserved to himself the income from the property

and the power of direction. The trust agreement further provided that upon his death, the beneficial interest in the trust should vest in his friend, John Lacic, and his cousin Martha Brozowski.

Martha Smola, John Lacic and Martha Brozowski knew nothing of this land trust conveyance until after the death of Albert Smola in 1967. John Lacic and Martha Brozowski paid nothing for this transfer.

Prior to the marriage Albert Smola took his bride to be to the property in question and told her that he owned the property. He also said that if anything happened that the property would be hers.

In July, 1955, plaintiff and Albert Smola set a date for the wedding to take place in December of 1955, but plaintiff postponed the wedding until after her children had graduated from school which was to be in June of 1956.

They were married on July 2, 1956 and lived together thereafter as husband and wife until he died intestate on August 16, 1967. At the time of their marriage in 1956 the plaintiff was 46 and Albert Smola was 64 years of age.

One witness testified at the hearing that Albert Smola had a conversation with him in 1956 a couple of months before the marriage in which Albert Smola told him that "he had prepared something and although he didn't tell me exactly what it was, and the building and his money would be set in a certain way that his wife couldn't get it away from him."

At the death of Albert Smola in 1967, the property in question was valued at \$31,500.00. Plaintiff inherited other property from the deceased husband valued at approximately \$46,750.00.

The trial judge entered a decree in favor of the widow, declared the widow to be the owner of the subject property, divested the beneficial owners of all interest in the property and ordered that all rents collected from the date of the death

of the husband be turned over to the widow.

Defendants have appealed claiming that the decree is against the manifest weight of the evidence and contrary to law. Defendants further contend that Albert Smola and the plaintiff had an agreement that they were to retain their respective properties.

Regarding the agreement, the most that was produced to indicate any such thing was an equivocal answer that the plaintiff gave in response to a question that "it could be that an oral understanding existed that whatever he had was his and whatever I had was mine." The trial court considered this statement along with the other evidence and concluded that no agreement was established with regard to this property. We do not find the trial court's ruling on this point to be manifestly against the weight of the evidence. Such an agreement, even if it existed, would be subject to scrutiny. Surely, without more, it was at best incomplete and might pertain to the management of one's individual property without it being intended that a surviving spouse would be deprived of rights of inheritance. We are not disposed to disturb the finding of the trial court on this point.

Neither do we feel that the decree in its ultimate conclusion is either against the manifest weight of the evidence or contrary to law.

We have reviewed the cases cited and discussed by the plaintiff and the defendants and believe that the law in this case is clearly on the side of the plaintiff.

In *Lill v. Lill*, 18 Ill2d 393, 164 NE 2d 12, it was stated at page 398 as follows:

"It has been well settled in a number of cases ranging from *Freeman v. Hartman*, 45 Ill. 57 to *Moore v. Moore*, 15 Ill 2d 239, that a voluntary conveyance by either party to a marriage contract, of his or her real estate, made without the knowledge or consent of the other on the eve, or in contemplation, of marriage is prima facie a fraud upon the other's marital rights, and the burden is upon the grantee to establish its validity. There must be a fraudulent intent, which may be ascertained by inference from the circumstances, but it need not necessarily be directed against any

particular person. ...While there can be no arbitrary demarcation as to time between fraudulent and valid transfers, the time at which a man transfers his property before marriage is material in determining whether the conveyance can be deemed a fraud on the future wife's marital rights. The term 'in contemplation of marriage' has no rigid meaning as to the exact period of time within which a transfer is fraudulent, it being necessary, rather, to consider and decide each case in light of the particular factual situation. *Jarvis v. Jarvis*, 286 Ill. 478."

In reviewing the various cases cited by both the plaintiff and the defendant, we find no dispute or lack of clarity as to the law of the case. The different results reached in the various cases all turn on the difference in the factual situations. None of the cases cited by the defendants can be said to conflict as a matter of law with the decision reached by the trial court in this case.

We believe that a prima facie case of fraud on the plaintiff's marital rights was clearly raised in this case and was not adequately rebutted by the defendants. Since we believe that the trial court correctly followed the law and since the decision is not contrary to the manifest weight of the evidence, the decree should be and the same is accordingly affirmed. *Michna v. May*, 80 Ill. App2d 281, 225 NE 2d 391.

DECREE AFFIRMED

STOUDER, J. concurs.

ALLOY, J. concurs.

ABST.



No. 53589

PEOPLE OF THE STATE OF)	
ILLINOIS,	)	APPEAL FROM THE
Plaintiff-Appellee,)	
	)	CIRCUIT COURT OF
)	
v.	)	COOK COUNTY.
)	
)	
WILLIE W. STEWARD (Impleaded),	)	HON. FRANK J. WILSON
Defendant-Appellant.	)	PRESIDING.

MR. JUSTICE SCHWARTZ DELIVERED THE OPINION OF THE COURT.

In each of three indictments, numbered 68-239, 68-240 and 68-241, the defendant was charged with the offense of armed robbery. On arraignment a plea of not guilty was entered, but after the case was called for trial and eight jurors had been selected, defendant was permitted to withdraw that plea and to enter a plea of guilty on all three indictments. The court imposed concurrent sentences of not less than four nor more than five years in the penitentiary on each indictment. A notice of appeal was filed and the Public Defender now requests leave to withdraw as defendant's attorney of record. Defendant has been furnished with (1) a copy of counsel's petition for leave to withdraw, (2) a brief referring to any points which might arguably support the appeal, and (3) a notification of his right to raise any points he may see fit to support the appeal.

In a letter to this court defendant asserts that (1) he has not yet received the supplemental record filed in this case and therefore is unable to raise any points in support of his appeal which might be disclosed therein, (2) some of the proceedings were purposely omitted from the record on appeal so as to prevent his raising matters which would support

No. 53589

his appeal, (3) the Public Defender has not interviewed him concerning the appeal, and (4) as it is now constituted, the record is so incomplete that a full and fair review of the proceedings is impossible.

Examination of the record shows that defendant was arraigned and convicted on three separate indictments, each charging him with armed robbery. The notice of appeal refers only to one of the indictments (No. 68-240). The record contains no order consolidating the indictments for trial and only indictment No. 68-241 appears therein. Under Anders v. California, 386 U.S. 738 (1966), the initial reviewing court is required to make a full examination of all the proceedings in order to decide whether the case is "wholly frivolous." In the instant case the record does not contain indictments No. 68-239 or 68-240. They may be relevant and should be made part of the record on appeal in order to enable this court to make a full examination of all the proceedings.

Although defendant objects to the incomplete form of the record and to the Public Defender's failure to interview him, no request is made to have other counsel appointed. The Public Defender has made a motion to withdraw, but it is our opinion that he should continue to represent the defendant until such time as the record on appeal is complete and the court will then consider a motion to withdraw. The motion must now be denied.

MOTION DENIED

DEMPSEY, P.J. and McNAMARA, J. concur.

ABST.

131 ILL APP. 2187

53687

PEOPLE OF THE STATE OF ILLINOIS,)	APPEAL FROM
Appellee,)	
)	CIRCUIT COURT,
vs.)	
)	COOK COUNTY.
LAWRENCE PHILLIP CARPENTER,)	
Appellant.)	HON. THOMAS R. MC MILLEN, Presiding.

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT:

In August 1965 defendant entered a plea of guilty to an indictment charging him with attempt murder and armed robbery, and was sentenced to a term of three years to ten years in the penitentiary. Upon post-conviction proceedings defendant was granted a new trial and the indictment was reinstated on the trial docket. Defendant was thereafter tried before a jury, found guilty and sentenced to a term of seven years to twelve years in the penitentiary. He appeals.

On January 21, 1965 James Bracht1 and his wife owned and operated a drugstore at 3801 West 31st Street in Chicago. At approximately 7:00 P.M., Mr. Bracht1 was at the front of the store near a cigar counter, counting small change, and Mrs. Bracht1 was in the rear of the store at a desk in the prescription room. The Brachtls were the only persons in the store at the time. Shortly after 7:00 P.M., two men entered the store through the front entrance, later identified by the Brachtls as the defendant and a companion, Robert Cossie.

Defendant entered the store first and rushed to the rear, where the cashier's cage was located, holding his hand inside his jacket. Mrs. Bracht1 testified that she became suspicious when she observed the defendant, and that she left the store through a rear exit to telephone the police. Meanwhile, Robert

Cossie entered the store and went immediately to the cigar counter, where he stood approximately two feet from Mr. Bracht1 and, without uttering a word, pointed a pistol at Mr. Bracht1's head.

Mr. Bracht1 testified that he carried a revolver in his pharmacy coat pocket during working hours, and that he reached into the pocket and fired a shot through the coat at Cossie, who was standing about a foot and a half away. Cossie then ducked behind the cigar counter, apparently wounded. At that point the defendant began cursing and fired shots at Mr. Bracht1, who returned the fire. Mr. Bracht1 was struck in the side by a bullet from defendant's gun and fell to the floor. He testified that while he was on the floor and in a semi-conscious state, he heard footsteps proceeding from the rear of the store where the cashier's cage was located.

Mrs. Bracht1 testified that after she had exited the store and was proceeding to a telephone, she heard gunshots. She told a neighbor to telephone the police and returned to the store, finding her husband lying in a pool of blood. The police arrived and Mr. Bracht1 was taken to a hospital for treatment. Mrs. Bracht1 testified that when she returned to the store the following morning she noticed about \$110 missing from the cashier's cage at the rear of the store.

Mrs. Bracht1 testified that when she left her husband at the hospital after the shooting, she was taken to police headquarters where she viewed photographs, none of which was that of the defendant or Cossie. After a short stay at police headquarters, Mrs. Bracht1 was transported to a second hospital where she identified Robert Cossie as one of the assailants;

Cossie had been admitted to the hospital for treatment of a gunshot wound in the stomach. Cossie was then placed under arrest.

The day following the occurrence Mrs. Bracht1 was again called to police headquarters where she identified the defendant out of a line-up. After she had made the identification, the defendant commented, "That's the lady from the drugstore at 31st and Hamlin Avenue."

Both Mr. and Mrs. Bracht1 testified that they recognized the defendant and Cossie because the two men were seen by the witnesses in and around the drugstore the evening before the shooting and robbery. They testified that both the defendant and Cossie came up to and looked through the front window of the store on three occasions, and that defendant used the telephone inside the store on another occasion while Cossie remained at the front of the store, apparently leafing through magazines. There was also evidence that the Brachtls' drugstore was busy on the night before the incident, with people constantly coming into and leaving the store.

Frank Cossie, Robert's brother, testified for the People. He stated that about 8:00 P.M. on the night of the incident he saw defendant, Robert Cossie, Robert's wife, and a man named Cox, and that Robert had been shot. After attempting to remove the bullet from his brother, the witness persuaded him to have the bullet removed at a hospital.

Defendant testified in his own behalf and stated that he arrived at the Cossie residence about 6:00 or 7:00 P.M. on January 21, 1965 where he stayed a while drinking beer. Mrs. Cossie, who was pregnant at the time, became ill and requested her husband and the defendant to purchase medication for her.

Defendant, Robert Cossie and Cox drove to the Bracht1 drug-store, and defendant and Cossie entered the store. Defendant testified that he proceeded to the rear of the store to the prescription counter, that he then heard gunshots, and that he fell to the floor. He testified that when the shooting stopped he rose and proceeded to the front of the store where he observed Cossie lying wounded on the floor. The defendant denied having a gun in his possession when he entered the store, denied shooting Mr. Bracht1, and also denied entering the cashier's cage and removing money from the register.

Defendant first contends that he was not proven guilty of the crime of armed robbery beyond a reasonable doubt. He argues that the only evidence of his possession of a dangerous weapon was the testimony of Mr. Bracht1 which was not corroborated by any other evidence, and he further argues that the evidence fails to show that the money was taken from the presence or person of the Brachtls. These were matters of weight and credibility for the trier of fact.

The evidence adduced by the People was that defendant and Cossie had been seen by the Brachtls in and around the drugstore on the evening of January 20, 1965, the day before the robbery and shooting, acting in a suspicious manner; that the defendant and Cossie entered the drugstore on the evening of January 21, 1965; that the defendant was observed hurriedly walking toward the rear of the establishment where the cashier's cage was located, holding his hand inside his jacket; that Cossie held a gun to Mr. Bracht1's head after which Mr. Bracht1 shot him in the stomach; that defendant thereupon opened fire on Mr. Bracht1, shooting him in the side; that Mr. Bracht1 heard footsteps coming

from the area of the store where the cashier's cage was located, after the shooting; and that over \$100 was missing from the cash drawer after the incident.

The testimony of a single witness, if that testimony is positive and the witness credible, is sufficient to sustain a conviction although that testimony is contradicted by the accused. Mr. Bracht1 testified that defendant possessed a gun and used it during the incident; his testimony is positive, and no evidence appears to cast doubt upon his credibility. *People v. Tribbett*, 41 Ill. 2d 267. Further, the question of the Brachtls' identifications of the defendant was a matter for the trier of fact. It cannot be said that the jury's determination is so palpably contrary to the weight of the evidence, or that it is so unsatisfactory, as to justify a reasonable doubt of the defendant's guilt. *People v. Nicholls*, 42 Ill. 2d 91.

As to the question of whether the money was taken from the person or presence of the Brachtls, the evidence reveals that defendant entered the store and proceeded immediately to the area of the cashier's cage; that after defendant shot Mr. Bracht1, the latter heard footsteps proceeding from that area of the store; that over \$100 was missing from the cashier's cage on the morning following the incident; that no one could have entered the store between the time Mrs. Bracht1 exited and returned after the shooting; and that the Brachtls owned the pharmaceutical business they were operating at the location. On these facts the jury could reasonably have found that the defendant and/or his companion had taken the money from the control of the Brachtls. (See *People v. Oglesby*, 53 Ill. App. 2d 179.)

Defendant next contends that the indictment fails to adequately charge the offense of attempt murder. He maintains that

the wording of the indictment fails to detail the specific manner in which he is alleged to have attempted the murder, and that the indictment further fails to allege an essential element of the offense, namely, the substantial step taken toward the commission of the offense.

The wording of the indictment in the instant case, regarding the allegation of the substantial step taken, is identical to that contained in the indictment in issue in the case of *People v. Drink*, 85 Ill. App. 2d 202. In the *Drink* case, the court stated that "[a]n attempt to kill is clearly an act constituting a substantial step toward the commission of the offense of murder." (At page 204.) The indictment here charged the defendant with attempting to murder Mr. Bracht1 on January 21, 1965 and adequately informed him of the charge so that he could prepare his defense and plead the judgment in bar to any further prosecution for the same offense.

Defendant also argues that the indictment fails to specify the sub-section of the homicide statute under which he was indicted. The allegation of the intention to kill or to do great bodily harm to another satisfies the mental state requirements for the offense of murder. *People v. Taylor*, 95 Ill. App. 2d 130; *People v. Drink*, 85 Ill. App. 2d 202.

The cases cited by defendant in support of his position are inapposite on their facts to the factual situation in the case at bar. In *People v. Green*, 368 Ill. 242, an information charged the defendant in the general language of the statute, without alleging the necessary specifics. In *People v. Peters*, 10 Ill. 2d 577, an information failed to allege material specifics in an

action for unlawful practice of law. In *People v. Chiafreddo*, 381 Ill. 214, defendant advised a child to refuse to salute the flag; the indictment for contributing to the dependence and neglect of the child was found lacking in the specifics charging the actual crime, since the language of the statute governing dependence and neglect did not specifically cover the offense of advising to refuse to salute the flag. See also *People v. Sowrd*, 370 Ill. 140.

Defendant further contends that certain comments by the prosecuting attorney during closing arguments denied him a fair trial. He first contends that the prosecutor commented upon evidence to which an objection had theretofore been sustained, relating to defendant's telephone conversation which Mr. Brachtl allegedly overheard the evening before the incident. Objection to the prosecutor's comment in this regard was sustained, and the court noted that it would not be considered by the jury.

The defendant also states that the prosecutor made comments which were calculated to shift the burden of proof to the defendant, when he stated that Mrs. Cossie could have testified at the trial. A reading of the entire context of the argument in this regard reveals that the prosecutor did no more than state that the testimony of Mrs. Cossie could have corroborated that of the defendant; he did not state that her testimony would have been adverse to the defendant's, nor that it was incumbent upon the defendant to prove his innocence through her testimony. The case of *People v. Smith*, 74 Ill. App. 2d 458, cited by defendant, is not in point; there, the comment by the prosecutor raised the improper inference that defendant's failure to call a certain

person as a witness meant that the testimony of that person would be adverse to the defendant. (See *People v. Sanford*, 100 Ill. App. 2d 101, distinguishing the *Smith* case.)

Defendant also argues that the prosecutor engaged in argument which tended to personalize the evidence, by stating that the defendant had misstated the truth while on the witness stand and that he was a potential murderer. These comments constituted permissible argument and did not have the effect as contended by the defendant. The prosecutor relied upon the matters in evidence in support of the comments. *People v. Weaver*, 18 Ill. 2d 108; *People v. Sullivan*, 22 Ill. 2d 122.

The final contention of the defendant is that the court committed error in pronouncing a harsher sentence on the retrial, as no additional matters were brought to the court's attention which could have justified the increased penalty. In *North Carolina v. Pearce*, 395 U.S. 711, the United States Supreme Court, considering the question, said, page 713, "When at the behest of the defendant a criminal conviction has been set aside and a new trial ordered, to what extent does the Constitution limit the imposition of a harsher sentence after conviction upon retrial?"

The Supreme Court held that the second sentence cannot be more severe than the first unless the reasons therefor affirmatively appear of record and unless those reasons are based on "identifiable conduct" of the defendant occurring after the time of the original sentencing, and secondly, that the time actually served on the first sentence must be credited to the sentence imposed upon the retrial. The Supreme Court further pointed out that vindictiveness against a defendant for having successfully

attacked his prior conviction must play no part in the sentence he receives after the new trial. (See also *People v. Moriarty*, 25 Ill. 2d 565.)

In the instant case there is no evidence in the record which can support the harsher sentence imposed upon retrial. On the contrary, it appears that the trial judge based the harsher sentence on the fact that defendant pleaded guilty to the indictment in the first instance, and then in the second trial he denied all complicity in the incident, expecting, as the court stated, "to be given the same sentence as he got when he pleaded guilty and admitted his complicity." The trial court was in error in fixing the harsher penalty on the second trial.

For these reasons the judgment of conviction is affirmed and the part of the judgment imposing the sentence is reversed and the cause is remanded with directions to reduce the sentence in accordance with these views.

JUDGMENT OF CONVICTION AFFIRMED AND THE
PART OF THE JUDGMENT IMPOSING THE SENTENCE
REVERSED AND CAUSE REMANDED WITH
DIRECTIONS.

Mc Cormick, P.J., and Lyons, J., concur.

ABST

131 ILL. APP. 224

53773

ANITA BOGDAN,)	
	)	APPEAL FROM THE
Plaintiff-Appellant,	)	CIRCUIT COURT OF
	)	COOK COUNTY
vs.)	
)	
WALTER BOGDAN,)	
	)	HON. ALFONSO F. WELLS,
Defendant-Appellee.	)	JUDGE PRESIDING

MR. PRESIDING JUSTICE BURMAN DELIVERED THE OPINION OF THE COURT.

The sole question presented in this appeal is whether the Circuit Court properly exercised its discretion when it denied a pre-decree petition to reopen proofs and introduce additional evidence in a divorce case.

Anita and Walter Bogdan were married in 1940. On December 1, 1967, Anita Bogdan filed suit for divorce on the ground of physical cruelty. The cause was heard as a non-jury contested divorce on September 25, 1968. After all the evidence had been presented, the Circuit Court concluded, among other things not at issue in this appeal, that the plaintiff, Anita Bogdan, was entitled to \$50.00 per week as permanent alimony and to a specific division of property.

At the trial, the defendant, Walter Bogdan testified that since July, 1968, he had been employed by his nephew, William Bogdan, doing construction work for the Bogdan Cement Company and that his sole income was his salary from the Bogdan Cement Company which averaged \$145.00 to \$150.00 per week. He further testified that he had been the owner and operator of the Vincennes Cement Corporation from 1957 to November, 1967, when the Corporation ceased to transact business. During this period Anita Bogdan worked for the Corporation and was paid \$50.00 per week.

Prior to the presentation of a formal draft decree embodying the Circuit Court's award, the plaintiff filed a pre-decree petition to reconsider and modify the proposed divorce decree in respect to the alimony and property division. The allegations of the petition indicated (1) that the defendant's income exceeded \$145.00 to \$150.00 per week, (2) that the Vincennes Cement Corporation contrary to the defendant's testimony at trial, had conducted business subsequent to November, 1967, and (3) that the defendant had concealed assets. The petition was denied.

After the divorce decree was entered, the plaintiff sought substantially the same relief pursuant to a motion under Section 68.3 of the Civil Practice Act (Ill. Rev. Stat. 1967, Ch. 110 §68.3). This motion was also denied.

The plaintiff contends that it was an abuse of judicial discretion to deny her petition and motion in the light of the newly discovered evidence impeaching the defendant's testimony concerning his financial condition.

The defendant contends that the petition and motion were properly denied because they brought out no evidence which was unavailable to the plaintiff at the time of trial.

Once the parties to a case have rested, neither party can reopen the proceedings to introduce further evidence, as a matter of right. Department of Public Works and Buildings v. First National Bank of Waukegan, 61 Ill. App. 2d 78, 209 N.E.2d 21 (1965). The general rule is that once a party has rested his case, the question of whether the case should be reopened to receive additional evidence is a matter to be answered and resolved by the Circuit Court in the exercise of its discretion. Forest Preserve District of Cook County v. Lehmann Estate Inc., 388 Ill. 416, 58 N.E.2d 538 (1944). A court of review will reverse the Circuit Court's exercise of discretion in refusing to reopen proofs in a case only when the discretion is clearly abused and the failure to reopen may result in substantial injustice. Rosehill Cemetery Co. v.

City of Chicago, 352 Ill. 11, 185 N.E.170 (1933).

The plaintiff sought to introduce additional evidence relating to the defendant's income, assets, and ability to pay alimony. The amount of alimony granted to a party to a divorce is measured by the needs of the party and the ability of the divorced spouse to contribute. Herrick v. Herrick, 319 Ill. 146, 149 N.E.820 (1925). A decretal order granting alimony does not have the finality of other judgments because under Section 19 of the Divorce Act (Ill. Rev. Stat. 1967, Ch. 40 §19) an alimony award may be modified if the needs and circumstances of the former spouses change.

The trial judge stated that the \$50.00 weekly alimony award was based on the defendant's present income and that "if he makes more money, she can come in." The record discloses that the plaintiff diligently obtained documentary evidence to support her claim of newly discovered evidence and that she presented it to the Court before the entry of the decree.

In addition, newly discovered evidence that a material witness gave knowingly false testimony is in itself sufficient to warrant the granting of a new trial. Swiney v. Miller, 253 Ill. App. 81 (1929).

We have carefully reviewed the record and are of the opinion that the allegations in the pre-divorce decree petition are of such a nature that a hearing on the petition should have been granted before the entry of the decree. This is a divorce matter. The order of the Circuit Court in regard to the alimony and property rights was dependent upon the testimony of the defendant at the trial. In such a case the credibility of a party to the divorce may be attacked by a proper petition particularly

before the entry of the final decree. We are mindful that another hearing on the finances of the defendant may be an imposition of the Circuit Court, particularly with the case load before it, but we think that substantial justice will be better served by giving the plaintiff a full hearing on the allegations in her petition. We emphasize that anything said here is not to be construed as an expression by us on the merits of the allegations set forth in plaintiff's petition. Whether plaintiff is entitled to have the decree modified is a matter for the trier of facts.

Accordingly, the cause is remanded for further proceedings not inconsistent with this opinion.


REVERSED AND REMANDED.

MURPHY AND ADESKO, JJ.,
CONCUR.

(Abstract only)

ALST

53347

PEOPLE OF THE STATE OF ILLINOIS,)	APPEAL FROM	
Plaintiff-Appellee,)		
	)	CIRCUIT COURT,
vs.)		
	)	COOK COUNTY.
LOUIS WRIGHT,)		
Defendant-Appellant.)		HON. THOMAS R. MC MILLEN, Presiding.	

MR. PRESIDING JUSTICE BURKE DELIVERED THE OPINION OF THE COURT:

Defendant was found guilty at a jury trial of the crime of unlawful possession of narcotics and was sentenced to a term of five years to fifteen years in the penitentiary. He appeals.

In the early morning of October 25, 1966 Officers Washington, Jamison and Robinson of the Vice Control Division of the Chicago Police Department were on duty in the vicinity of 43rd Street and Prairie Avenue in Chicago. At approximately 4:15 A.M. Officer Jamison was informed by an unidentified special employee of the Department that a man named "Louis" would be selling narcotics in the vicinity of 44th Street and Michigan Avenue that morning. The informer, who had been used successfully by the officers on several occasions in the past, gave a description of the person to whom he referred and detailed the manner in which he would be selling the narcotics.

Pursuant to the information so given the officers proceeded in their unmarked police car to the vicinity of 44th Street and Michigan Avenue, and at approximately 4:30 A.M. they observed the defendant, who fitted the description given by the informer, walking along Michigan Avenue toward 44th Street and join a woman on the corner. The woman was known by two of the officers in the course of their duties as narcotics officers. Defendant and the woman then walked to within ten feet of the officers' vehicle, and when the officers alighted from the vehicle and were walking toward

the defendant for the purpose of placing him under arrest, he threw a tinfoil packet into the nearby grass. Officer Jamison retrieved the packet while the other two officers detained the defendant and his companion. After Officer Jamison retrieved the packet and examined its contents, he stated to the other officers that the substance resembled narcotics; the defendant and his companion were then placed under arrest. Subsequent chemical analysis in the field by one of the arresting officers, and also later by a police chemist revealed the contents of the packet to be heroin.

Defendant testified at a hearing on a pre-trial motion to suppress evidence and denied possessing narcotics or throwing narcotics to the ground in the presence of the officers on the date in question. He also testified that his female companion did not throw any narcotics to the ground. The motion to suppress the evidence of the narcotics was denied. Defendant did not testify during the case in chief.

Defendant first contends that the trial court erred in denying his motion to suppress the evidence because the police officers did not have probable cause to effect his arrest without a warrant and because the recovery of the narcotics was the result of unlawful police activity.

An arrest may be made by a law officer without a warrant when he has reasonable grounds or probable cause to believe that the person sought to be arrested has committed or is committing a criminal offense. *People v. Wright*, 41 Ill. 2d 170. Whether probable cause exists in a given case must be governed by the circumstances of that case, and the question of the existence of probable cause or reasonable grounds will be determined in light of the

factual and practical considerations of everyday life, upon which reasonable and prudent men act. People v. Hanna, 42 Ill. 2d 323; People v. Davis, 34 Ill. 2d 38.

Probable cause for effecting an arrest without a warrant may be found in the information furnished by an informer of established reliability, or where that information is independently corroborated. People v. Durr, 28 Ill. 2d 308.

In the instant case, three police officers from the Chicago Police Department's Narcotics Unit were cruising in an unmarked police automobile in the vicinity of 43rd Street and Prairie Avenue in the city during early morning hours. One of the officers was told by a known and reliable informer that the defendant would be selling narcotics in the area that morning. The informer had been used by the officers on several occasions in the past, resulting in several convictions specifically named by one of the officers at trial. The informer also gave a description of the defendant and detailed the manner in which he would transact his narcotics sales.

The officers proceeded to the vicinity of 44th Street and Michigan Avenue in their unmarked vehicle and parked the vehicle near that intersection. The officers observed defendant walking on the sidewalk where he was later joined by a female companion who was known by two of the officers in connection with narcotics activities. As the defendant and the woman neared the parked police vehicle, the officers alighted from the vehicle and moved toward the defendant, whereupon the defendant threw a tinfoil packet to the ground. Defendant and his companion were detained by two of the officers while the third officer inspected the

contents of the packet. After inspection, defendant and his companion were placed under arrest. Under these circumstances the officers had probable cause to stop the defendant and to effect his arrest without a warrant.

In *People v. Erb*, 128 Ill. App. 2d 126, police officers were about to question the driver and passenger of an automobile involved in a traffic violation when they smelled the odor of what they believed to be burning marijuana emanating from the vehicle and also from two persons who had just alighted from the vehicle. The occupants of the automobile were searched and a weapon was found on one of them. One of the officers retrieved a packet of a substance which one of the former occupants had much earlier thrown into a nearby ditch. The trial court denied a motion to suppress the evidence of the narcotics, and the court on review upheld the ruling, holding that the officers had reasonable grounds to believe that, because of the "odor of marijuana," more than a traffic violation was involved, and that a more serious offense was being committed, under the entire circumstances confronting the officers.

Defendant cites *People v. Beattie*, 31 Ill. 2d 257, as standing for the proposition that when property is abandoned, discarded or thrown away, as the result of the threat of an unlawful arrest, the property is inadmissible as evidence. The *Beattie* case does not so hold. In *Beattie*, two police officers, acting on information they received from an informer, proceeded to an address where they observed the defendant entering a taxicab. The officers approached the cab and took hold of the defendant's arm, whereupon defendant threw a tinfoil packet out of the cab, later found to contain narcotics. At a hearing on a motion to suppress the narcotics as evidence, the trial court allowed a defense motion to strike the officers' testimony concerning the information supplied by the informer, on the ground that the name of the informer was not disclosed, but the court nonetheless denied the motion to suppress on

the ground that the officers were previously familiar with the defendant and his use of narcotics. The court on review remanded the case with directions to hold a hearing on the question of the informer's reliability, which, when considered in the light of other corroborating circumstances, would or would not constitute reasonable ground or probable cause to justify an arrest of the defendant without a warrant and to further justify the subsequent search.

In the instant case, the reliability of the informer was established by the testimony of one of the arresting officers, and there were circumstances corroborating the informer's information which gave rise to probable cause upon which the officers could effect an arrest of the defendant without a warrant. (See e.g., *Aguilar v. Texas*, 378 U.S. 108, 114.)

Finally, there is no evidence that defendant knew that the officers, after they had alighted from their vehicle and were walking toward the defendant, intended to place him under arrest, or that "[i]t was the sight of the police officers, descending menacingly on the accused, which caused him to discard the packet" as the defendant maintains, constituting unlawful police activity. These were matters for determination by the trier of fact from the evidence adduced at trial. (See *People v. Bridges*, 123 Ill. App. 2d 58.)

Defendant also contends that he was denied a fair trial due to certain allegedly improper comments made by the prosecutor during final argument.

Defendant first complains that the prosecutor made improper references to the matter of sentencing and probation. The record reveals that the prosecutor's comments were made in response to defense counsel's argument, covering some four pages in the record, that defendant was being "railroaded into the penitentiary" and that

the "proceedings were a sham." Further, other than an objection made to the prosecutor's reference to his experience in narcotics court, the defendant raised no objection to this line of argument at trial; the matter has been waived. *People v. Hampton*, 44 Ill. 2d 41, 46.

Defendant next contends that the prosecutor improperly encouraged the jury to rely on a police agency to determine the facts and to thereby abdicate its role as fact finder. He argues that the prosecutor stated to the jury that the Internal Investigation Division of the Chicago Police Department investigates any "charges of foul play" on the part of police officers. Defendant challenged the credibility of the police officers who testified at trial, and during closing argument he assailed the general reputation of the members of the Police Department's Vice Control Division. A reading of the entire comment by the prosecutor in response to defendant's arguments in this regard reveals that the prosecutor's comment was general in form, was made concerning the Vice Control Division as a whole, and did not relate to the credibility of the officers who testified at trial. Further, no objection was raised by defendant at trial. *People v. Hampton*, 44 Ill. 2d 41, 46.

The final contention raised by defendant is that the prosecutor improperly argued to the jury that the transcript of testimony, made at a pre-trial hearing, was inaccurate in one respect, after he had stipulated to its accuracy at trial. The matter in question related to the testimony of Officer Robinson as to whether he had actually seen the tinfoil packet thrown from the defendant's hand. Defendant argued the inconsistency to the jury, and in rebuttal the prosecutor labeled the inconsistency as minor. The prosecutor also went on to state that the courtroom in which the officer had made his initial statement was crowded and noisy, and he questioned

whether the court reporter who took the statement transcribed it correctly. Officer Jamison, the officer who retrieved the tinfoil packet from the ground, testified that he observed defendant throw it to the ground; the inconsistency between Officer Robinson's trial testimony and his pre-trial testimony in this regard was therefore in fact a minor one. Further, no objection was raised to the prosecutor's comment at trial and, again, the point has been waived. People v. Hampton, 44 Ill. 2d 41, 46.

For these reasons the judgment is affirmed.

JUDGMENT AFFIRMED.

LYONS, and GOLDBERG, JJ., concur.

ADST.

131 ILL. APP. 2305

53947



PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM
Plaintiff-Appellee,)	
	)	CIRCUIT COURT,
vs.)	
	)	COOK COUNTY.
NATHANIEL BARR, DAVID WRIGHT and)	
JAMES NELSON,	)	HON. L. SHELDON BROWN,
Defendants-Appellants.	)	Presiding.

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT:

Defendants were tried before a jury under two indictments, one charging the rape and armed robbery of Ella Mae Moore and the other charging the armed robbery of Willie Moore. All three defendants were found guilty as charged, and each was sentenced to a term of ten years to twenty-five years in the penitentiary. They appeal.

On June 22, 1968, between 1:00 A.M. and 2:00 A.M., Willie Moore and his wife, Ella Mae, were seated in their automobile parked in front of 4233 South Wabash Avenue in Chicago after having visited friends at that address. A group of twelve to fifteen young persons were around the automobile, and as Mr. Moore reached to turn the key in the ignition, a man Moore later identified as defendant Barr approached with a gun and stated, "I wouldn't do that if I were you." Two or three other persons approached from the driver's side of the vehicle and forcibly removed Moore's wristwatch and finger ring.

At the same time Mr. Moore was being accosted, several other persons, including defendants Wright and Nelson, approached Mrs. Moore's side of the vehicle and forcibly dragged her from the car. Mrs. Moore testified that Wright and Nelson each had her by an arm. She stated that she was dragged through a gangway between buildings to the rear of a building where she was knocked to the ground by Nelson and Wright and was raped by three men. She testified that her wallet containing \$10 was also taken.

As Mrs. Moore was being dragged from the vehicle and into the gangway, Mr. Moore had gotten out of the automobile and money was forcibly taken from his pocket. He then attempted to enter the gangway into which his wife had been dragged, but his progress was blocked by several persons of the group. The police had been summoned by a neighbor who witnessed the occurrence; they arrived shortly, and Mrs. Moore was discovered coming from the gangway wearing only a skirt and crying that she had been raped. The Moores' automobile was also taken from the scene when Mr. Moore attempted to help his wife.

On the day following the incident Mr. and Mrs. Moore were summoned to police headquarters to view a line-up comprised of six men, including the three defendants. Mr. Moore testified that prior to viewing the line-up he observed Barr and recognized him as the person who robbed him the night before; he also identified Barr in the line-up. Mrs. Moore testified that she identified Wright and Nelson as the two persons who dragged her from the automobile. Mrs. Moore also testified that no suggestions as to which persons to be identified from the line-up were made by any of the officers present at the line-up, but that one officer stated that she and her husband "were on our own" and that if the boys were not identified they would be released. Both complaining witnesses made in-court identifications of the defendants. Fingerprints subsequently taken from one of the windows of the Moores' automobile matched those of defendant Wright.

Darrel Montgomery was called as a witness for the People and testified that he had been seated with his uncle in an automobile parked behind the Moores' vehicle at the time of the incident. He testified that he observed Barr, whom he had known for about two years, with a gun in his hand, that he observed Nelson dragging Mrs. Moore out of the car, and that he observed Wright "swinging a man around."

On cross-examination of the witness he admitted that he was "picked up" by the police with defendant Wright's brother, lying against the Moores' automobile some time after it had been taken from the scene of the incident. The trial court refused to allow defense counsel to question the witness concerning the circumstances surrounding the witness' association with the automobile and his encounter with the police.

For the defense, several witnesses testified that none of the defendants had anything to do with the Moores on the night in question and that all three defendants were at a party at the time. Defendants testified on their own behalf and denied complicity in the matter.

A pre-trial motion to suppress the identification testimony was made by defendants, and after a hearing was had on the motion it was denied.

Defendants maintain that the trial court erred in limiting defense counsel's cross-examination of People's witness Montgomery concerning his connection with the Moores' stolen automobile and his consequent possible interest in the matter, as bearing on his credibility.

We are in agreement with the defendants' contention that considerable latitude should be allowed on cross-examination of a witness to "explain, modify or discredit" what was testified to on direct examination. (People v. Mason, 28 Ill. 2d 396.) Nonetheless, the latitude to be allowed on cross-examination rests within the sound discretion of the trial court; unless such discretion is clearly abused, a court on review will not interfere with the trial court's determination in that regard. People v. McCain, 29 Ill. 2d 132.

There is nothing in the record indicating that People's witness Montgomery, nor anyone else, had been accused of or indicted for the crime of automobile theft. Defendants were on trial under three

counts of armed robbery and rape. Allowing defense counsel to extensively question the witness concerning a conjectured possibility of the commission of another crime, unrelated to those for which defendants were indicted, could well have opened the door to issues far afield from those before the jury and caused considerable confusion. We find no abuse of discretion in the trial court's limitation of the cross-examination of Montgomery.

Defendants contend that they were denied the right to be represented by counsel at the line-up. The line-up was conducted the day following the incidents complained of and before the indictments were returned against the defendants. It has been repeatedly held that the presence of counsel is not required under such circumstances. See *People v. Palmer*, 41 Ill. 2d 571; *People v. Cesarz*, 44 Ill. 2d 180.

Defendants also maintain that they were not proven guilty beyond a reasonable doubt inasmuch as the evidence failed to show the criminal intent or concert of action necessary to establish accountability.

Mr. Moore testified that defendant Barr held a gun on him as several other young men forcibly removed the witness' wristwatch and his finger ring. At the same time that was taking place, defendants Wright and Nelson forcibly dragged Mrs. Moore from the vehicle and took her through a gangway to the rear of a nearby building where she was robbed and raped by three men. When Mr. Moore attempted to go to the assistance of his wife, he was stopped by other members of the group of twelve to fifteen young persons who were present. The facts clearly show that the youths were acting in concert, entertaining the intention of aiding those who actually perpetrated the offenses. The presence of the three defendants was not "mere presence or negative acquiescence" at the scene or in the crimes. They voluntarily

attached themselves to the group which shared the common purposes which in fact were achieved. Ill. Rev. Stat. 1969, Chap. 38, Paras. 5-1, 5-2; People v. Clark, 30 Ill. 2d 67; People v. Cole, 30 Ill. 2d 375, 379.

For these reasons the judgments are affirmed.

JUDGMENTS AFFIRMED.

MC CORMICK, P.J., and LYONS, J., concur.

ABST

131 ILL. APP. 2 313



No. 53954

PEOPLE OF THE STATE OF ILLINOIS,)	
	)	APPEAL FROM THE CIRCUIT
Plaintiff-Appellee,)	
	)	COURT OF COOK COUNTY.
vs.)	
	)	Hon. Mel R. Jiganti,
ADOLPH MCGOWAN (Impleaded),)	
	)	Presiding.
Defendant-Appellant.)	

MR. JUSTICE McNAMARA DELIVERED THE OPINION OF THE COURT.

Defendant, Adolph McGowan, pleaded guilty in the Circuit Court to three charges of unlawful possession of narcotics and to one charge of bail jumping. He was sentenced to a term of five to seven years on each possession of narcotics charge, and to a term of four to five years for bail jumping, all sentences to run concurrently. On appeal, defendant's sole contention is that the sentences imposed were excessive and should be reduced by this court.

On September 29, 1966 defendant was indicted for unlawful possession of heroin. On January 10, 1967 he was indicted for another charge of unlawful possession of heroin. On March 20, 1967 he again was indicted, this time for a controlled sale of heroin to an informer. On July 29, 1967 defendant was indicted for bail jumping for failing to appear in court on the afore-said narcotics indictments. On March 29, 1968 he was convicted of a narcotics violation in the United States District Court and sentenced to a term of three years. On July 30, 1968, he appeared in the Circuit Court and pleaded guilty to both charges of possession of narcotics and also to the charge of bail jumping. As to the charge of sale of narcotics, he pleaded guilty to the lesser offense, possession of narcotics. He was sentenced as we have set forth above. The four sentences were to run concurrently with one another, as well as concurrently with the United States District Court sentence.

The penalty for unlawful possession of narcotics, Ill. Rev. Stat. 1965 Ch. 38 §22-40(5) for the first offense is a term of not less than two years or more than ten years. The penalty for any subsequent narcotics offense is any term from five years to life. The Act provides for the additional penalty whether the prior narcotics offense is in the State court or Federal court. The penalty for jumping bail, Ill. Rev. Stat. (1965) Ch. 38 §32-10, is a term of not more than five years.

Defendant's sole contention on appeal is that the sentences imposed were excessive, and he requests that this court exercise its authority to reduce the sentences.

While this court has the authority to reduce sentences, (Supreme Court Rule 615(b)(4), Ill. Rev. Stat. 1967, ch. 110A §615), our Supreme Court has indicated that this authority should be exercised with considerable caution and circumspection. The People v. Taylor, 33 Ill.2d 417, 211 N.E.2d 673 (1965). And we do not believe that this is a proper case for the exercise of that authority. Since defendant at the time of the instant sentences had a previous federal narcotics conviction, he could have been sentenced for a term of five years to life on any one of the narcotics charges alone. Consequently the sentences of five to seven years for the narcotics convictions obviously were not excessive. Although defendant received almost the maximum sentence for bail jumping, in view of his flagrant disregard of the law and of the judicial process, the sentence appears to us not to have been excessive. While awaiting trial for three separate and unrelated narcotics charges, defendant skipped bail and apparently was apprehended only when arrested for a fourth narcotics violation. Moreover, as we have noted, all of the sentences, including that imposed by the Federal

court, were to run concurrently.

The judgment of the Circuit Court is affirmed.

JUDGMENT AFFIRMED.

DEMPSEY, P.J. and SCHWARTZ, J. concur.

No. 53970

PEOPLE OF THE STATE
OF ILLINOIS,
Plaintiff-Appellee,

v.

HERSHEL CARUTHERS,
Defendant-Appellant.

)
) APPEAL FROM THE
)
) CIRCUIT COURT OF
)
) COOK COUNTY.
)
)
) HON. EDWARD J. EGAN
) PRESIDING.

ABST.

MR. JUSTICE SCHWARTZ DELIVERED THE OPINION OF THE COURT.

Hershel Caruthers was indicted for the crimes of theft (Ill. Rev. Stat., ch. 38, §16-1(a) (1963)) and possession of a motor vehicle with the motor number falsified (Ill. Rev. Stat., ch. 95-1/2, §4-102(i) (1963)). On May 26, 1966 the defendant pleaded guilty to the latter charge and the court entered judgment on his plea and released him on probation for a period of three years. On January 10, 1969 the defendant was found guilty of theft and sentenced to serve one year in the Illinois State Farm at Vandalia. A rule to show cause why probation should not be terminated was served on defendant and the Public Defender was appointed to represent him at the hearing on the rule. The trial court heard the matter, revoked probation and sentenced defendant on his prior guilty plea to one to three years in the Illinois State Penitentiary. Defendant appeals from the order of revocation.

The Public Defender who was appointed to represent the defendant has filed a motion to withdraw and pursuant to Anders v. California, 386 U.S. 738 (1967) has filed a brief alleging that the only possible issues on appeal are whether defendant received a fair hearing on the charge of violation of probation and whether the evidence proved he was guilty of

No. 53970

that violation. The defendant was mailed a copy of the motion and brief and was given the opportunity to file any points he might wish in support of his appeal. He has not done so.

Notice of alleged violation of probation and the opportunity to defend against the charge must be given a defendant. People v. Dotson, 111 Ill. App. 2d 306, 250 N.E. 2d 174; People v. Dwyer, 57 Ill. App. 2d 343, 206 N.E.2d 113. These requirements were met in the instant case in that the defendant was sent a copy of the rule to show cause together with a copy of a report by the probation officer describing the alleged violation. At the hearing before the trial court he was represented by the Public Defender.

Probation may be revoked upon proof of violation by a preponderance of the evidence. Ill. Rev. Stat., ch. 38, §117-3(b) (1969); People v. Killion, 113 Ill. App. 2d 461, 251 N.E.2d 411. According to the transcript a certified copy of the judgment of conviction on January 10, 1969 was presented to the judge. Probation may be revoked before a defendant has been convicted of the offense which constitutes the alleged violation. People v. Smith, 105 Ill. App. 2d 14, 245 N.E.2d 13. In the instant case probation was not revoked until after defendant had been convicted of the crime.

We have made a full examination of all the proceedings in accordance with Anders v. California, 386 U.S. 738 (1967). The revocation of probation was proper. The Public Defender's motion for leave to withdraw is allowed and the judgment is affirmed.

JUDGMENT AFFIRMED

DEMPSEY, P.J. and McNAMARA, J. concur.

ABST.

131 ILL. APP. 338

54052-3



PEOPLE OF THE STATE OF ILLINOIS,)
Plaintiff-Appellee,)

v.)

DEWITT WATKINS,)
Defendant-Appellant.)

) Appeal from the Circuit
) Court of Cook County.
)

) Arthur V. Zelezinski, AJ.
)

MR. PRESIDING JUSTICE DEMPSEY DELIVERED THE OPINION OF THE COURT:

The defendant, DeWitt Watkins, was found guilty of the theft of \$45.00 in a non-jury trial and sentenced to nine months in the House of Correction. His contentions are that bail was not set for him before trial and that he was not informed of his right to bail under Ill.Rev.Stat., 1967, ch. 38, paras. 110-2 and 110-4.

Watkins was arrested on February 14, 1969, on a robbery complaint. Three days later the robbery charge was nolle prossed, the prosecuting witness signed another complaint charging petty theft, a jury was waived and Watkins was tried and convicted. The record on appeal did not include the complaint signed February 14th but only the complaint of February 17th, and neither this complaint nor the record of proceedings for February 17th contained any reference to bail. Watkins argues from this that bail was not set and he was not informed of his right to bail. The State, however, filed a supplemental record containing the complaint of February 14th

54052-3

which charged him with robbery. This record shows that on that date the court fixed bail for Watkins in the amount of \$5,000.00.

The judgment will be affirmed.

Affirmed.

Schwartz and McNamara, JJ., concur.

ABST

131 ILL. APP. 347

54110



PEOPLE OF THE STATE OF ILLINOIS,)
)
Plaintiff-Appellee,)
)
)
v.)
)
CHARLES MITCHELL,)
)
Defendant-Appellant.)

Appeal from the Circuit
Court of Cook County.

Reginald J. Holzer, J.

MR. JUSTICE DEMPSEY DELIVERED THE OPINION OF THE COURT:

In a non-jury trial Charles Mitchell was found guilty of burglary and was sentenced to serve a term of not less than one nor more than four years in the penitentiary. He contends that the State did not prove that he entered the burglarized premises and did not prove him guilty beyond a reasonable doubt. He also contends that he was indicted for the wrong offense.

On April 6, 1968, riot conditions prevailed in several Chicago neighborhoods. People gathered in the streets, buildings were set on fire and stores were looted. One of these stores was a ladies' wear and dry goods shop located at 135 North Kedzie Avenue. The owner of the store testified that she left by a rear door about 4:00 p.m., after a large crowd smashed the front windows. She circled the store and from the opposite side of Kedzie Avenue saw people coming out of it with her merchandise in their arms. Three squad cars, each with four policemen, came to the scene and arrests were made.

One of the policemen was Felix Gembala. His unmarked squad car stopped across the street from the store and he saw people running

from the store carrying packages. As he got out of the car he saw the defendant walking away from the store with packages in his arms. When Mitchell saw Gembala he started to flee. Gembala, who was in full uniform, ran into the street and intercepted him. Mitchell stopped and dropped the packages—curtains and drapes wrapped in cellophane—and was placed under arrest.

Mitchell was the only person Gembala arrested and no other officer participated in the arrest. Gembala stated that all the plate glass windows of the store were broken, as was the glass in the front door. He said people were crowded around the premises; there was shouting and people running in all directions. Other policemen testified that there was much confusion and that miscellaneous merchandise was lying on the sidewalk and the street.

Mitchell denied entering the store, removing merchandise or picking any up from the ground. He testified that he had been in his father's barber shop, 254 North Kedzie Avenue, from 11:00 a.m. to 3:45 p.m. A friend, Charles Ethridge, came to the shop and they left to pick up Ethridge's girl friend. He also testified that he and Ethridge left the barber shop at 1:30 p.m., went to his home which was nearby and stayed there until 2:30 p.m. and then walked toward the girl friend's house. It was Ethridge's birthday and as they sauntered along Kedzie Avenue they were talking about his birthday party. They approached the dry goods store shortly after 4:00 p.m. and became separated in the crowd. He said that the store windows were intact when he arrived but he also said that they were already broken. He did not see anyone take anything from the store but there were articles all over the street and some were near his feet

when the officer arrested him. He asserted that the officer picked up some of them and accused him of having had them in his possession.

Ethridge and two other men were also arrested. The four accused were tried together for burglary. Mitchell and Ethridge were found guilty, while the other two were acquitted. A separate appeal was prosecuted by Ethridge (People v. Ethridge, No. 54111, filed January 21, 1971).

Entry into the burglarized premises, an essential element of the crime of burglary, may be proved by circumstantial as well as direct evidence. Circumstantial evidence is legal evidence and there is no distinction between circumstantial and direct evidence so far as weight and effect are concerned. A conviction for burglary can be sustained upon circumstantial evidence. The recent, exclusive and unexplained possession of stolen property, soon after the commission of a burglary, is evidence of the guilt of the person in whose possession it is found and is sufficient to warrant a conviction. People v. Francis, 362 Ill. 247, 199 N.E.2d 100 (1935); People v. Brown, 27 Ill.2d 23, 187 N.E.2d 728 (1963), cert den. 374 U.S. 854.

In People v. Franceschini, 20 Ill.2d 126, 169 N.E.2d 244 (1960), it was said:

"Burglary can seldom be proved by direct evidence of the actual breaking and entry, and in most cases such fact must necessarily be inferred from other facts and circumstances proved or admitted.

....

"The rule is well settled that the recent, exclusive and unexplained possession of the proceeds of a burglary in itself gives rise to an inference of guilt which may be sufficient to sustain a conviction unless there are other facts and circumstances which leave in the mind of a jury or the trial court if a jury is waived, a reasonable doubt of guilt."

The testimony of Officer Gembala established Mitchell's guilt. He saw Mitchell walking away from the store with stolen property in his arms. When the defendant saw the officer he dropped the property and fled. At his trial he denied having any merchandise in his possession at any time. Although many witnesses testified at the trial, only two testified concerning Mitchell's alleged offense: Gembala and Mitchell, himself. The trial judge, as the trier of the facts, chose to believe Gembala's testimony. This he was entitled to do and the testimony of one credible witness is sufficient for conviction. People v. Novotny, 41 Ill.2d 401, 244 N.E.2d 182 (1969); People v. Anthony, 28 Ill.2d 65, 190 N.E.2d 837 (1963).

In this court an explanation is offered for Mitchell's possession of the stolen goods: he may have picked them up from the ground in front of the store and if he was guilty of any offense it would be, at most, theft. This explanation was not advanced in the trial court and need not be considered here. 24 C.J.S., Criminal Law, sec. 1669, sec. 1676 (1961). Furthermore, the belated explanation is in direct conflict with the defendant's own testimony denying possession of the articles taken from the store. A court of review will not disturb a trial judge's finding unless there is a serious doubt of the defendant's guilt. There is no such doubt in this case. The State's evidence was sufficient to prove Mitchell guilty beyond a reasonable doubt.

The defendant argues that he was improperly indicted; that because of the riotous conditions that prevailed at the time of the crime, he should have been indicted for looting rather than for burglary. The statute he has reference to is as follows:

"Looting by individuals.) A person commits looting when he knowingly without authority of law or the owner enters any home or dwelling, or upon any premises of another, or enters any commercial mercantile, business or industrial building, plant or establishment, in which normal security of property is not present by virtue of a hurricane, fire, or vis major of any kind or by virtue of a riot, mob, or other human agency and obtains or exerts control over property of the owner." Ill.Rev.Stat., 1967, ch. 38, para. 42-1.

In support of his argument the defendant cites a number of cases holding that a specific statute supersedes a general statute. However, the defendant's contention was disposed of adversely to his position in People v. Long, 126 Ill.App.2d 103, 261 N.E.2d 437 (1970). This court said at page 108:

"Defendants further claim that when normal security of property is not present by virtue of riot, mob, or other human agency, the crime of burglary is not a proper charge. However, we do not believe that it was the intent of the legislature to frustrate and impede prosecutions for burglaries perpetrated during periods of civil disturbance and treat burglars differently simply because lack of security made their job easier."

Moreover, it is the responsibility of the State's attorney of the county to appraise the evidence against an accused and determine the offense with which he should be charged. People v. Rhodes, 38 Ill.2d 389, 231 N.E.2d 400 (1967). The State's attorney with all of the facts of the present case before him was justified in seeking an indictment for burglary.

The judgment is affirmed.

Affirmed.

McNamara, P.J., and Schwartz, J., concur.

Opinion filed Jan. 7, 1971

131 ILLAPP2 370

54148



PEOPLE OF THE STATE OF ILLINOIS,)
)
Plaintiff-Appellee,)
)
v.)
)
JOHN CONWAY,)
)
Defendant-Appellant.)

Appeal from the Circuit
Court of Cook County.

Frank J. Wilson, AJ.

ABST

MR. JUSTICE DEMPSEY DELIVERED THE OPINION OF THE COURT:

John Conway was indicted for rape and armed robbery and he entered a plea of not guilty to each charge. He was admitted to bail but did not appear when his case was called for trial and he was indicted for violating the conditions of his bail bond (Ill. Rev. Stat., 1967 ch. 38, para. 32-10). Upon his arraignment for this offense he pleaded not guilty. When the two cases came on for trial he was represented by private counsel. A conference was had with the court and State's attorney, the pleas of not guilty were withdrawn, pleas of guilty were entered, the evidence was stipulated and he was sentenced to the penitentiary for four years and one day on the rape and robbery charges and to a concurrent term of one to four years for the offense of jumping bail.

After final judgment was pronounced the defendant was informed that he had the right to appeal and that, if he was without funds, counsel would be appointed for him. The public defender, who filed the appeal, now seeks to withdraw. He has filed a brief in support of his motion pursuant to the case of Anders v. California, 386 U.S. 738, and contends that the only basis for the appeal would

be whether the trial court fully admonished the defendant as to the significance and consequences of his pleas of guilty. The public defender concludes that the court in its admonishment adhered to the requirements of the statute and the case law and that an appeal could not possibly be successful.

The defendant received a copy of the public defender's motion and brief; he was also sent a letter by this court notifying him of the motion and informing him that he could file any points he might choose to support his appeal. No response has been received from him.

We have made a complete examination of the record and have concluded that the public defender is right and that there is no merit to this appeal. The trial court informed the defendant of his right to a jury trial, of the minimum and maximum sentences for the three offenses and of the consequences that could follow pleas of guilty. The defendant persisted in his pleas and they were accepted. The motion to withdraw as counsel for the defendant is granted and the judgments are affirmed.

Judgement affirmed.

McNamara, PJ. and Schwartz, J., concur.

ABST.

131 ILLAPP²374

No. 54155

PEOPLE OF THE STATE OF
ILLINOIS,
Plaintiff-Appellee,

v.

TONY WALSH,
Defendant-Appellant.

)
) APPEAL FROM THE
)
) CIRCUIT COURT OF
)
) COOK COUNTY.
)
)
) HON. MINOR K. WILSON
) PRESIDING.

MR. JUSTICE SCHWARTZ DELIVERED THE OPINION OF THE COURT.

Defendant was indicted on two charges of burglary committed on August 19, 1968. At his arraignment he said that he could not engage an attorney and the office of Public Defender was appointed to represent him. A plea of not guilty was entered. On April 21, 1969 defendant withdrew his plea of not guilty and pleaded guilty. The court sentenced him to a term of one to five years in the Illinois State Penitentiary for each offense, the sentences to run concurrently. On May 9, 1969 defendant filed a notice of appeal and the office of Public Defender was appointed as his counsel.

A motion to allow him to withdraw from the case has now been filed by the Public Defender. He states that from an examination of the transcript of the common law record and the report of proceedings, the only basis for an appeal would be whether the court fully admonished the defendant as to the significance and consequences of changing his plea from not guilty to guilty. In accordance with Anders v. California, 386 U.S. 738 (1967) the Public Defender has submitted to this court the transcript of proceedings and the statement by the court admonishing the defendant as to the significance and consequences of changing his plea from not guilty to guilty.

No. 54155

It clearly appears from the record submitted that the court described to the defendant at great length the nature of a jury trial and emphasized with great care defendant's right to such a trial. It further appears that when the court had completed his lengthy explanation he asked defendant whether he understood the waiver of the jury right, to which defendant replied, "Yes, your Honor. I'll stick with the plea of guilty."

Defendant was notified of the Public Defender's motion to withdraw and was given an opportunity to raise any points he might wish in support of his appeal. His only contention which has any possible merit is that he was not tried within the 120-day period provided by statute. Ill. Rev. Stat., ch. 38, §103-5 (1969). Eight months elapsed between the defendant's arrest and the trial, but in the meantime, on November 27, 1968, which was less than 120 days after his arrest, defendant requested a mental examination and the court ordered such an examination by the Behavior Clinic. The Clinic reported that defendant was able to understand the nature of the charges against him, was able to assist in his defense and was not in need of mental treatment. The statute specifically provides for certain exceptions to the 120-day period, among which is "delay occasioned by the defendant, by an examination for competency ordered pursuant to Section 104-2 of this Act...." which clearly applies to the instant case.

We have made a full examination of all the proceedings in accordance with Anders v. California, 386 U.S. 738 (1967) and we sustain the position of the Public Defender. His motion for leave to withdraw is allowed and the judgment is affirmed.

JUDGMENT AFFIRMED

DEMPSEY, P.J. and McNAMARA, J. concur.

54312

ESTATE OF PAUL TEMPLE, DECEASED

JACK JOSEPH, Administrator de bonis non)
 with the will annexed of the estate)
 of PAUL TEMPLE, Deceased,)
 Petitioner-Appellant,)
 vs.)
 UNITED OF AMERICA BANK, O. T. HOGAN and)
 C. J. Schaniel,)
 Respondents.)
 UNITED OF AMERICA BANK,)
 Respondent-Appellee.)
 and)
 JACK JOSEPH, Administrator de bonis non)
 with the will annexed of the estate of)
 PAUL TEMPLE, Deceased,)
 Petitioner-Cross-Appellee,)
 vs.)
 UNITED OF AMERICA BANK,)
 Respondent-Cross-Appellant.)

APPEAL FROM THE
 CIRCUIT COURT OF
 COOK COUNTY.

Hon. James M. Corcoran,
 Presiding.

MR. JUSTICE LYONS DELIVERED THE OPINION OF THE COURT.

Jack Joseph, administrator de bonis non with the will annexed of the Estate of Paul Temple filed an action in the Circuit Court of Cook County naming as parties defendant United of America Bank, O. T. Hogan, and Charles J. Schaniel. The complaint alleged that respondents had wrongfully appropriated assets of the Estate of Paul Temple having the value of \$54,606.52, and prayed for judgment in that amount and for interest from the date of the alleged wrongful appropriation. The Circuit Court entered judgment for petitioner in the amount prayed but denied the prayer for interest. From that judgment both petitioner and respondents appeal. We consider first the appeal of the respondents.

The record indicates the following facts to be uncontroverted. Paul Temple was confined in Evanston Hospital from February 20, 1966, until March 5, 1966, the date of his death. He underwent surgery on March 3, 1966, and never regained consciousness before his death. At the time of Temple's death,

Charles J. Schaniel, president of United of America Bank (hereinafter called United) had in his possession three cashier's checks payable to Temple. The first of these checks was dated January 18, 1966, bore number 74191B, and was drawn on the Florida National Bank at St. Petersburg in the amount of \$25,000. The remaining two checks were drawn on respondent United. One, number 17001, was dated February 21, 1966 and in the amount of \$57,000. The other dated March 3, 1966, bears number 18138 and is in the amount of \$12,000. The consideration for each of the checks drawn on respondent United was a debit to the account of deceased in the amount of each check. The record does not indicate the consideration given for the check drawn on the Florida National Bank at St. Petersburg. Following the death of Temple, United placed a stamp bearing the legend "Credited to the account of the within named payee, United of America Bank" on each of the checks. In addition, the check drawn on the Florida National Bank was endorsed by United and forwarded through an intermediary bank to the Florida National Bank for payment. United did receive payment or credit for that check.

The total of the three checks so endorsed is \$94,000. No portion of the proceeds of any of the checks was ever credited to an account of the deceased, Paul Temple. The endorsement of Paul Temple does not appear on any of the checks. Finally, the record fails to reveal how any of the checks came into Schaniel's possession.

Charles Shepherd, who had been appointed executor of Temple's estate and who had resigned that position prior to the initiation of the present proceedings, was the first witness called by petitioner and testified that during the time which he served as executor, he never received an accounting, either written or oral, from United. Neither did he receive from United any notes or other evidences of obligations of Paul Temple to United.

On the Monday following Temple's death, March 7, 1966, the witness conferred with Charles Schaniel in the latter's office concerning the financial affairs of the deceased. Shepherd testified that he did not know whether Temple had any funds at the time of his death which could be used for the payment of the funeral expenses and he related this information to Schaniel. Mr. Schaniel then informed the witness that there was nothing to worry about and displayed an envelope which he stated contained a check for \$42,000 which he was holding for Temple.

Finally, Shepherd testified that one Tom Sheridan, a business associate of the deceased, was also present at this meeting and that arrangements were made to pay the funeral expenses of Temple by checks drawn on the account of Pioneer Medical Buildings, Inc. It was agreed that Mr. Sheridan, Temple's associate in the Pioneer Medical business venture, would sign the checks and United would honor them. This arrangement was agreed upon because the Pioneer Medical account was the only one which they believed they had authority to write a check on. At this time Shepherd was not aware of the balance in the Pioneer Medical account. He was not acting as administrator of the estate at this meeting and he never gave United written authorization for any kind of transaction.

Petitioner then introduced two evidentiary depositions. The first of these was that of Jack Coulter, comptroller of the Florida National Bank at St. Petersburg. At the taking of the deposition, Coulter testified that he had, pursuant to subpoena, brought with him a certain check. That check bearing number 74191B, was drawn on the Florida National Bank at St. Petersburg on January 18, 1966, in the amount of \$25,000. Coulter testified that from the dates appearing on the endorsements on the check he was able to determine that it took three days for the check to reach St. Petersburg through correspondent banks. That is the

normal time for a check to reach the Florida National Bank from Chicago. The check, which was paid upon receipt, named Paul Temple as payee.

Finally, Coulter testified that he did not know Paul Temple or have knowledge of the purchase of the check or its presentation for payment. He is the officer who has supervision and control of the records of the Florida National Bank, including the check referred to in his testimony.

The second evidence deposition introduced by petitioner was that of Joseph W. Bradham, Jr., an attorney practicing in St. Petersburg. Mr. Bradham had testified that check number 74191B drawn on the Florida National Bank and payable to Paul Temple in the amount of \$25,000 was in his possession from January 18, 1966 until March 2, 1966. On the latter date he mailed it to Paul Temple at 5653 North Ashland Avenue, Chicago, Illinois. Bradham could not recall whether the check was sent by "registered return or certified mail." He did testify, however, that his usual practice is to send such matter by "certified or registered return mail." He last spoke to Paul Temple on the Wednesday before his death, March 2, 1966, the date the check was mailed.

Finally, petitioner introduced into evidence his requests for admissions and respondents' answers thereto. The requests and answers established the following additional facts. Respondent United is a banking corporation existing under the laws of the State of Illinois and doing business at 1 East Wacker Drive in the City of Chicago. During his lifetime Paul Temple transacted business with United. Respondent Charles J. Schaniel has been president of United since its inception and is a stockholder of that corporation. Respondent O. T. Hogan has at all material times been a member of the Board of Directors of United. The copies of the three cashier's checks discussed above and introduced with the

request for admissions are copies of genuine instruments.

Also admitted is the fact that United appropriated the proceeds of the three checks in question to three notes which respondents allege were outstanding obligations of Paul Temple, owed to respondent United at the time of Temple's death. No officer of respondent United saw Temple during his confinement in Evanston Hospital. On or about April 14, 1966, United delivered to Charles Shepherd, then executor of Temple's estate, a check for \$39,393.38, representing the only funds delivered by United to a representative of Temple. No written account of transactions between United and Temple was ever delivered to Shepherd. Demands for an accounting made by Jack Joseph as administrator de bonis non with the will annexed of the estate of Paul Temple were not complied with until after the commencement of the instant suit. No written agreements exist between United and either Shepherd or Joseph with respect to the estate of Temple. United has not delivered any note made by Temple to Joseph nor has it filed a claim against Temple's estate. United has no written authorization to setoff checking account overdrafts or other obligations of Pioneer Medical Building, Inc. against the assets of the estate of Paul Temple.

Charles J. Schaniel, called by respondents, testified as follows. He met with Charles Shepherd on March 8, 1966, and told Shepherd that he, Schaniel, was holding a cashier's check for Paul Temple in the amount of \$43,873. No other person was present at this conversation. The witness also informed Shepherd that United had been presented with certain checks drawn on the Pioneer Medical account in excess of the balance in that account. The checks were, in his opinion, for payment of personal obligations of Temple. Schaniel asked Shepherd if he should continue to pay the overdrafts and Shepherd responded in the affirmative. Witness also indicated to Shepherd that he would like to be

notified as soon as Shepherd was approved as executor. During the course of the conversation he surrendered three unsecured notes, made by Temple.

Schaniel further testified that the check for \$43,873 represented the amount due Temple following a transaction which took place on March 7, 1966, in which United deducted from the total amount payable to Temple under the checks discussed above, the sum of three unsecured notes made by Temple and payable to United. Schaniel also testified that each of the cashier's checks used in this transaction bore Temple's endorsement. The witness had another private conversation with Shepherd not more than thirty days following April 14, 1966, in which he informed Shepherd that he was holding a cashier's check payable to Temple in the amount of \$39,393.38, which represented the remainder of Temple's funds which had been left with him. Specifically, it represented the balance of the three cashier's checks discussed above following deductions for the notes alleged to have been made by Temple in favor of United and also minus overdrafts to Temple's and to Pioneer Medical's checking accounts in the total amount of \$4,397.52. At this conversation, Schaniel surrendered the three notes made by Temple to Shepherd. (He had previously testified that these notes were given to Shepherd on March 8, 1966.)

Finally, Schaniel testified that the three cashier's checks in question were all in his possession at the time of Temple's death. The check drawn on United for \$12,000 since March 3, 1966, and that for \$57,000 was in his possession since February 21, 1966. The \$25,000 check drawn on the Florida National Bank had been in his possession since sometime in January of 1966.

On cross-examination Schaniel testified that he had ten or more conversations with Shepherd between the date of Temple's death and July 5, 1966. The first of these conversations took

place following the transaction whereby a portion of the funds in his possession belonging to Temple were setoff against Temple's notes. In a private meeting with Shepherd sometime after Shepherd had presented documentary evidence of his appointment as executor, they had a conversation concerning the payment of several bills. He believed that the funeral bill was among these. He could not recall an instance where he had a conversation with both Shepherd and Sheridan. He did have a conversation with Sheridan following Temple's death but the tenor of that conversation was the bank's refusal to support Sheridan in his proposed continuation of the Pioneer Medical Buildings business venture he had engaged in with Temple. Shepherd was not present at this conversation.

On further cross-examination Schaniel at first testified that he never exhibited a check to Shepherd other than the one in the amount of \$39,393.38. Later, however, he testified that he may have had a conversation with Shepherd with respect to and may have exhibited a check in the amount of \$43,873.00 prior to the time that Shepherd had produced proof of his appointment as executor. Schaniel admitted having had such a check in his possession. He testified that it was prepared on March 8, 1966, and represented the balance of Temple's funds in his possession after deducting the amounts owed on the unsecured notes executed by Temple, but before the overdrafts on Temple's and Pioneer Medical's checking accounts had been deducted.

Finally, Schaniel testified on cross-examination that he made no memoranda of his conversations with Shepherd, although it is customary for him to do so where the conversation is highly significant and relates to the bank's affairs. Likewise, he made no record of his surrender of the Temple notes to Shepherd nor did he obtain a receipt for them. Notes of this character are returned to the maker upon payment and no notation of their return

is made. An exception exists, however, where the note is paid by one other than the maker. In that event the note is transferred to the party who pays it and a notation is made.

The originals of the notes allegedly made by Temple were not produced at trial. Respondents attempted to establish their execution and the consideration given therefor through various documents purported to be records of respondent United. Additional testimony by Mr. Schaniel was offered to establish a foundation for the admission of these documents. He testified, however, that he is not completely familiar with the record keeping procedures of the bank nor are such procedures under his supervision except to the extent that in his position as president of United all procedures are under his supervision and authority. He further testified that record keeping procedures are adopted without his knowledge or consent.

Edward B. McGuinn, general counsel for United, testified that following the commencement of the instant case he initiated a search for the Temple notes and that the search was not successful. He did locate another note of Temple, the significance of which will be discussed below.

Florence Brennenstuhl, employed as auditor of respondent United, was called and testified that among her duties are the balancing of United's records of outstanding loans with the actual notes executed in connection with such loans. Once a balance is struck the tabulating department prepares verifications which she then mails to the borrowers. The verification indicates the amount outstanding on the loan and the borrower is requested to check the figure on the verification with his own computations and if they coincide to sign and return the verification. Miss Brennenstuhl further testified that Respondents' exhibit 19 is a verification dated January 21, 1966 and addressed to Paul Temple at 225 North Wabash Avenue, Chicago. It contains a notation to the effect that

there were at the time of its preparation two outstanding obligations. The first, a loan dated October 5, 1965 for \$35,000 and due February 1, 1966; the second a loan dated December 20, 1965 for \$15,000 and due on March 21, 1966. The document bears a signature which is purported to be that of Paul Temple.

Also among her duties is the preparation of a monthly report to the Board of Directors on all loans in excess of \$25,000. While preparing such report for the month of January 1966, she noted that the Board of Directors had authorized loans to Temple in the amount of \$35,000 but the total of his outstanding unsecured loans was \$50,000. She then went to the note teller and requested the notes made by Temple for the purpose of confirming that each of the notes which her records reflected were unsecured. Respondents' exhibits 15, 15A, 16, 16A, 17 and 17A are copies of fronts and backs of the notes which she received and examined.

Almore H. Teschke, called as a witness on behalf of respondents, was examined and testified as follows. He is an attorney and also vice president and general counsel for United Insurance Company of America. He is also a member of the law firm which is counsel of record for respondent United. Approximately one year prior to his testimony he conducted a search of the records of the United Insurance Company of America for a note executed by Paul Temple. The search was unfruitful, although all records bearing any relation to Paul Temple were searched.

On cross-examination he testified that he had no independent recollection of having received the note for which the search was conducted.

Arthur Nelson, vice president and treasurer of United Insurance Company of America, instituted a search for an original secured note of Paul Temple dated in 1965. This search was instituted approximately one year prior to his testimony and

proved to be unfruitful. On the day prior to his testimony he again conducted a search for the note and discovered it in the file of one Herman Brocksmith, an individual who, according to the witness, was an associate of Paul Temple. Respondents' exhibit 23 is that note. The records of United Insurance Company of America do not reveal or disclose the source from which it received the note.

Respondents' exhibit 23 is the original of a secured note in the amount of \$100,000 dated July 26, 1965. It bears a signature purported to be that of Paul Temple. The note itself, it was admitted by respondents has been paid. It was offered in evidence as an alternative justification for the set off of the unsecured notes previously alleged to exist against the three cashier's checks in Schaniel's possession at the time of Temple's death. In that respect it was offered for the following language contained therein:

Six months after date the undersigned, for value received, promises to pay to the order of United of America Bank at its office in the City of Chicago, Illinois, One hundred thousand and 00/100 DOLLARS, waiving demand, notice and protest, with interest at the rate of 7 per cent per annum after maturity and as collateral security for payment of this and any other liability or liabilities of the undersigned to said Bank, due or to become due, whether now existing or hereafter arising and howsoever evidenced or acquired, whether direct, indirect, absolute or contingent and whether several, joint or joint and several, the undersigned hereby pledges with and to said Bank all property of the undersigned of any kind or description, tangible or intangible, now or at any time or times hereafter assigned, transferred or delivered to or left in or coming into the possession, control or custody of the Bank by or for the account of the account of the undersigned, whether expressly as collateral security or for any other purpose, including without limitation all property described in receipts for collateral from time to time issued by said Bank to or for the account of the undersigned. . . . (Emphasis supplied.)

Carl Christoffersen, the final witness called by respondents, testified as follows. He is senior vice president and a stockholder of United. Respondents' exhibit 4 is a summary prepared

by the witness of the transactions by which United setoff the Temple notes and the checking account overdrafts to Temple's and Pioneer Medical's accounts. The summary is in witness' handwriting. It does not represent a record made in the usual course of business. Rather, it was prepared to summarize an unusual transaction. Witness further testifies that he "must have had" the notes which the document refers to before him at the time that the statement was prepared, because the numbers, dates and amounts of the notes are recorded thereon. He could not recall, however, either where he got the notes or what he did with them following the preparation of the summary.

On appeal the respondents contend that the evidence presented below established an indebtedness owed by Paul Temple to United and that United under law has the right to exercise the remedy of setoff with respect to the assets of Temple in its possession and Temple's indebtedness to United. They further argue that a right to satisfy the indebtedness alleged exists by reason of the language of the secured note. Essentially, respondents argue that the judgment of the trial court was against the manifest weight of the evidence and contrary to law. They further argue that the check drawn on the Florida National Bank at St. Petersburg need not be considered for purposes of this appeal since the two checks drawn on United are more than sufficient in amount to cover the setoff.

Petitioner argues that the alleged indebtedness was not established, respondents' evidence being either inadmissible or not credible. Specifically he argues that the photostatic copies of the purported notes offered below were not admissible under the best evidence rule, as no satisfactory explanation of the absence of the originals was given, and no foundation for the copies was laid, as there was no evidence that they are true and correct copies. He further argues that these same copies are not

admissible as business records kept in the ordinary course of business. Finally with respect to these copies petitioner argues that they do not establish an indebtedness as existing at the time of Temple's death.

Petitioner also argues that other documentary evidence offered by respondents was not admissible for lack of proper foundation testimony. Finally, respondent argues that even if the alleged indebtedness were proved, United is not entitled to setoff because its possession of the checks in question was wrongful and that United had no authority in any case to satisfy the obligations of Pioneer Medical with the assets of Temple.

The remedy of setoff, urged as a defense below, has long been recognized in this jurisdiction. (See discussion in 4 Illinois Law and Practice, section 193 and cases cited therein.) It allows a bank to satisfy a debt due it by a depositor with assets of the depositor left in its possession, provided that the funds in the bank's possession are not a special deposit and provided further that the individual who is both the bank's depositor and debtor stands on the same footing and in the same relation to the bank in each of these capacities. It has never been held that the remedy of setoff may be asserted where the bank's possession of the assets is wrongful.

There is no question that United received the checks in question from Schaniel. The record is clear that prior to Temple's death Schaniel had them in his possession. Thus the propriety of United's possession can be gauged only by reference to the capacity in which Schaniel held the checks. Schaniel testified for respondents that he was holding the checks for Temple yet he also testified that his possession was as an officer of United.

At trial petitioner's theory of the case challenged the availability of the remedy of setoff even if the indebtedness alleged were proved by questioning the propriety of United's

possession of the checks. Counsel for respondents admitted at trial that the deceased engaged in the practice of leaving checks with business acquaintances when it served his convenience to do so and cited petitioner's evidence with respect to Mr. Bradham's holding of the check drawn on the Florida National Bank as an example of that practice. Respondents also acknowledge that Temple and the officers of United had become personal acquaintances during the course of the many years Temple conducted business with United. Further evidence of this relationship arises from the copies of certain notes introduced into evidence by respondents which they contend are copies of the notes upon which they base their defense of setoff. Mr. O. T. Hogan, a member of the board of directors of United, is a party to the notes as guarantor.

The evidence below thus established the relationship which had arisen between Temple and the officers of United and further established the deceased's practice of leaving checks in the possession of persons bearing a similar relation to him when such served his purposes. The evidence further established that Schaniel's treatment of the checks while they were in his possession was consistent with the theory that he held them as agent for Temple rather than for United. The consideration given for each of the checks drawn of United was a debit to Temple's account in the amount of the check. Thus the check represented funds withdrawn from an account, which represented funds of which United clearly did have possession prior to their withdrawal. Further, Schaniel's keeping of the checks in his desk is inconsistent with the theory that they might have been held as collateral for the alleged obligations of Temple. The record indicates that the checks were never placed in the hands of the collateral teller.

The propriety of even Schaniel's possession of the check drawn on the Florida National Bank was directly challenged by petitioner's evidence. The testimony of Mr. Bradham, an apparently

disinterested witness, established that the check drawn on the Florida National Bank was in his possession until March 2, 1966, when he mailed it to Temple at 5653 North Ashland Avenue, Chicago. This mailing from Florida to Temple at an address different from that of United took place only one day prior to Temple's having undergone the surgery from which he never regained consciousness. Yet Schaniel had possession of this check after Temple's death.

Thus there existed for the trial court's resolution the question of whether Schaniel held the checks in question for Temple or for United. Under the evidence we cannot say that the trial court may not have properly concluded that Schaniel held the checks in question as agent for Temple and not as an officer of United. In such case the surrender of the checks to United constituted a conversion and United's appropriation thereof would likewise constitute conversion, for it has never been contended that assets wrongfully in the possession of a bank may be appropriated to satisfy an indebtedness owed the bank by the owner thereof. Such a finding of wrongful possession would also defeat United's right to satisfy the indebtedness by reason of the language of the secured note.

Additional support for the trial court's holding, independent of questions relating to Schaniel's possession of the checks and whether United's possession was wrongful is found under Illinois Revised Statutes, Chapter 26, section 4-405 which provides:

(1) A payor or collecting bank's authority to accept, pay or collect an item or to account for proceeds of its collection if otherwise effective is not rendered ineffective by incompetence of a customer of either bank existing at the time the item is issued or its collection is undertaken if the bank does not know of an adjudication of incompetence. Neither death nor incompetence of a customer revokes such authority to accept, pay, collect or account until the bank knows of the fact of death or of an adjudication of incompetence and has reasonable opportunity to act on it. (Emphasis supplied.)

Thus any authority which United may have had prior to Temple's death to pay the checks drawn on it or collect the check drawn on the Florida National Bank terminated upon its receipt of knowledge of Temple's death. Respondents have admitted that United had knowledge of Temple's death by the beginning of the business day March 7, 1966, the date on which the transaction here involved occurred.

Under the statute United had no authority to deal with the checks and logic compels the conclusion that authority to deal with the proceeds of checks wrongfully paid or collected was likewise nonexistent.

The trial court might also have properly concluded that the remedy of setoff was not available to United due to the nature of the assets here involved. In the cases cited by respondents for the proposition that United was entitled to set off, the assets in question were funds deposited with the bank and represented by an account. Respondents have argued that the form which the assets take are of no significance. They contend that the basis of the relation from which the right of setoff arises is that of mutual creditor-debtor, and the checks drawn on United represent a debt owed Temple. (For purposes of this argument respondents have suggested that the check drawn on the Florida National Bank be ignored.) Even if the Florida check is not considered, we cannot agree.

We do not consider the general question of whether setoff is ever available to a bank where the bank's obligation is represented by other than an account. Rather, our inability to accept respondents' premise is rooted in the peculiar nature of the assets here in question. In support of their contention that the form of the assets are of no significance in determining whether setoff is proper, respondents have argued that had Temple's personal representative presented the checks for payment,

United would have been entitled to setoff the proceeds of the checks against the indebtedness alleged to be owed by Temple.

Illinois Revised Statutes, Chapter 26, section 3-413 specifically denies United any such right. That section provides in pertinent part:

(1) The maker or acceptor engages that he will pay the instrument according to its tenor at the time of his engagement or as completed pursuant to Section 3-115 on incomplete instruments.

(2) The drawer engages that upon dishonor of the draft and any necessary notice of dishonor or protest he will pay the amount of the draft to the holder or to any indorser who takes it up. The drawer may disclaim this liability by drawing without recourse.

By drawing the checks to which this discussion is limited, United engaged, by operation of Illinois Revised Statutes, Chapter 26, section 3-413(1) and (2) that it would pay the instruments "according to their tenor" and that upon dishonor it would pay the "amount of the draft" to the holder or any endorser. Thus had the checks been surrendered to Temple's representative and presented by him for payment, United would not have been entitled to setoff against the alleged obligations of Temple. Had such an attempt been made, it would have constituted dishonor of the instruments under Code section 3-507.

We find that the judgment of the trial court is neither against the manifest weight of the evidence nor contrary to law. As we have determined that the remedy of setoff was not available due to the nature of the assets held by Schaniel, that United had no authority to deal with the checks, and also that the trial court may have properly concluded that Schaniel's possession thereof was not that of United, discussion of the issues raised with respect to evidence presented to establish the existence of the notes is unnecessary. Even if it is assumed that the notes and obligations were proved, the remedy of setoff was not available to United and consequently its actions with respect to the

checks constituted a conversion. (See generally 35 Illinois Law and Practice, Section 4 and cases cited therein.)

There remains to be considered the question of whether the trial court erred in denying interest on the amount withheld by United from the date of the conversion. Respondents contend that interest is not recoverable where, as here, the reason for the delay is the reasonable defense of a law suit. Petitioner has argued that interest is recoverable under Illinois Revised Statutes, Chapter 74, section 2 which provides:

Creditors shall be allowed to receive at the rate of five (5) per centum per annum for all moneys after they become due on any bond, bill, promissory note, or other instrument of writing; on money lent or advanced for the use of another; on money due and the settlement of account from the day of liquidating accounts between the parties and ascertaining the balance; on money received to the use of another and retained without the owner's knowledge; and on money withheld by an unreasonable and vexatious delay in payment.

Petitioner contends that the finding of conversion by the trial court together with its determination with respect to the credibility of the witness Schaniel operate to establish vexatious delay in payment as a matter of law. He further contends that interest should have been allowed under the statute as the funds sought to be recovered represented money due on a written instrument. While we do not agree that the finding of the trial court with respect to the culpability of respondents and the trial court's determination with respect to Schaniel's credibility establish vexatious delay in payment as a matter of law, the true nature of the present suit was that of an action for money due on a written instrument. Instruments such as the checks here involved are not due until presented for payment, but such presentation was made impossible by their conversion. In such a situation respondents should not be relieved of the responsibility to pay interest by operation of their own wrongful act. We, therefore, hold that the trial court erred in denying interest on the amount

found to have been converted from the date of the conversion.

That portion of the judgment of the trial court in favor of petitioner and against respondents in the amount of \$54,606.52 is affirmed. That portion of the judgment denying interest on the amount is reversed and remanded to the trial court with directions to allow interest on the judgment from the date of conversion in accordance with the statute.

JUDGMENT AFFIRMED IN PART AND
REVERSED AND REMANDED IN PART
WITH DIRECTIONS.

MC CORMICK, P.J., concurs.

BURKE, J., dissenting:

The evidence shows that Paul Temple was indebted to United on three unsecured notes. His signature was identified. There was adequate consideration for the notes. Temple acknowledged his indebtedness to United.

The sole evidence concerning possession of the two cashier's checks drawn by United was that of Charles J. Schaniel, President of United, who testified that they were delivered to him on or about the date the checks bear and were thereafter in his possession. The only dispute as to possession of the checks concerns the check issued by the Florida National Bank and that issue need not be decided in order for United to prevail in this case because the checks of United are more than sufficient to satisfy the notes executed by Temple. Schaniel in all the transactions involving Temple was accounting for United.

The fact that Paul Temple did not endorse the cashier's checks is immaterial to United's right of setoff. If the administrator had presented the two checks drawn on United totalling \$69,000

(or if Temple had attempted to cash the checks during his lifetime) United would have been entitled to first apply the proceeds of the checks in payment of the notes payable by Temple to United. If Temple had presented the checks, United could set off the amount of the notes against the checks since they constitute mutual debts between the parties which are subject to setoff. The administrator has no greater right to enforce payment of a negotiable instrument than his decedent. *Printy vs. Cahill*, 235 Ill. 534, 539. The acquisition of an instrument by an administrator does not thereby make him a "holder in due course" of the instrument. Ill. Rev. Stat. 1969, Chap. 26, Sec. 3-302(3)(b). The cashiers' checks of United payable to Temple are in effect promissory notes in which United is the maker and Temple is the payee. See *Fred Miller Brewing Co. vs. Utz*, 46 Ill. App. 443. When the administrator filed his petition in the instant case all three of the unsecured notes were matured obligations. United's right of setoff was properly exercised against the administrator just as it would have been if Paul Temple had brought suit on the cashiers' checks.

The judgment should be reversed and the cause remanded with directions to enter judgment for United and against the administrator.

A351

131 ILL. APP. 491

54439-54637



PEOPLE OF THE STATE OF ILLINOIS,)
Plaintiff-Appellee,)
vs.)
HUGH DABNER,)
Defendant-Appellant.)

APPEAL FROM THE CIRCUIT
COURT OF COOK COUNTY.

Hon. Emmett Morrissey,
Presiding.

MR. JUSTICE LYONS DELIVERED THE OPINION OF THE COURT.

The defendant, Hugh Dabner, was charged with the sale of a narcotic drug (heroin) in violation of Ill. Rev. Stats. (1967) ch. 38, §22-3. Following a bench trial, the defendant was found guilty and was sentenced to the Illinois State Penitentiary for not less than ten nor more than eleven years.

On appeal, the defendant contends that: (1) the finding of guilty was contrary to the weight of evidence; (2) the evidence did not prove him guilty beyond a reasonable doubt; (3) his arrest without a warrant was unreasonable and not based upon probable cause; (4) the court erred by admitting certain evidence; i.e., \$20.00 U.S. currency, on behalf of the State; and (5) he was substantially prejudiced and denied a fair trial because the person to whom the unlawful sale was allegedly made did not testify as a State's witness and there was no testimony by any State's witness that the alleged buyer had ever identified the defendant as the seller.

The evidence adduced at trial established that on June 10, 1968, about 7:30 P.M., Detectives Frank Guerra, Anthony Rigoni, Walter LaGrow and James Lee drove to the vicinity of 55th and Calumet Streets, Chicago, for the apparent purpose of effecting a controlled purchase of illegal drugs. With the detectives in their unmarked squad car was another man, Herman Fields, variously referred to during the trial as the "third person," the "special employee," or the "informant."

After arriving at their destination, the officers searched Fields and found him to be free of money and contraband. Officer Rigoni then gave him \$20.00, consisting of one ten, one five and five one dollar bills. The currency was marked for identification with ink marks placed above the letter "E" of the word "NOTE" on the face of each bill.

Fields and Officer Guerra left the auto and Fields walked to the corner of 55th and Indiana where he met the defendant. Officer Guerra trailed about 70 feet behind Fields and maintained visual surveillance over him. Fields and the defendant then proceeded to the front of a restaurant at 305 East Garfield Boulevard. Officer Guerra followed the two men and maintained his visual contact. The defendant then entered the restaurant, leaving Fields standing alone in front. In less than five minutes, the defendant reappeared outside the restaurant and Officer Guerra "observed an exchange of hands." Fields proceeded immediately to the squad car and gave the officers a tin foil packet containing a substance which was field tested and found to be some form of opium. A later analysis by a police chemist revealed that the substance was heroin.

Meanwhile, after Fields had walked away from the defendant, the latter went back into the restaurant. Officer Guerra followed him into the restaurant and found him standing in front of the counter with \$20.00 in his hand. The officer placed the defendant under arrest and recovered the currency which proved to be the same money originally given to Fields by Officer Rigoni.

The defendant testified that he had been given the money by a friend named Jimmy. He stated that Jimmy owed \$20.00 to a mutual friend named "Keep" and Jimmy gave him the money for

delivery to Keep if and when he saw Keep again. He also indicated that he saw only police officers at the squad car when he was taken there by Officer Guerra immediately after the arrest. He denied having made any sale of narcotics.

Defendant's first two points on appeal concern the sufficiency of the evidence against him. He argues that inconsistencies in the testimony of the police officers and the absence during trial of the "third person" raise reasonable doubts of his guilt which, as a matter of law, require a reversal of the cause. We do not agree. Though there appears to be a conflict between the testimony of Officer Guerra and Officer Rigoni as to whether or not Fields entered the restaurant with the defendant, we believe that the trial court was entirely justified in attaching greater weight to Officer Guerra's testimony on this point. Officer Guerra was on foot behind Fields and indicated several times that his visual surveillance of Fields was never interrupted. He stated that Fields remained in front of the restaurant and did not enter. Officer Rigoni, on the other hand, testified that he was in the process of moving the squad car to another location when he passed by the restaurant and saw Fields entering with the defendant. As we have indicated, we believe that the trial court properly attached greater weight to Officer Guerra's testimony. Moreover, when a case is tried without a jury, the trial court must determine the credibility of the witnesses and the weight to be given their testimony and, unless the evidence is so unsatisfactory that a reasonable doubt is raised of the defendant's guilt, the finding on the point will not be overturned. People v. Pendleton, 75 Ill. App.2d 314, 221 N.E. 2d 112 (1966). In this case, the evidence was not so unsatisfactory that a reasonable doubt of defendant's guilt was raised.

We note also that the testimony of Herman Fields, the "third person," was in no way essential to the State's case. Experienced police officers closely observed every movement of the defendant and the "third person" and it was upon their testimony that the defendant was found guilty. See People v. Johnson, 110 Ill. App.2d 292, 249 N.E.2d 194 (1969). The State is under no obligation to call every witness to a crime and the State's failure to call Fields in this case does not raise any inference that his testimony would have been adverse to the State. People v. Lawrence, 126 Ill. App.2d 202, 261 N.E.2d 459 (1970). In any event, the State adequately explained Fields' absence.

Defendant next contends that his arrest without a warrant was unreasonable and not based on probable cause. Defendant suggests that Officer Guerra acted solely on unfounded suspicion because what he observed; i.e., an exchange of hands between Fields and the defendant, was susceptible of many innocent interpretations. The defendant, however, misplaces the applicable test of probable cause. The police are not obliged to view conduct in a manner to construe it as innocent; their job is to apprehend criminals, and if the conduct they observe can fairly be interpreted as criminal, they are entitled to arrest the suspect. People v. Wexler, 116 Ill. App.2d 400, 254 N.E.2d 95 (1969). While it may be true that an exchange of hands does not of itself suggest criminal conduct, such activity may be interpreted as criminal under appropriate circumstances. Defendant asks that we view only the exchange of hands and ignore the surrounding circumstances and preceeding events. This we will not do. It appears clear from the evidence that the police took Fields to the vicinity involved here for the specific purpose of effecting a controlled purchase of narcotics. Fields

was searched and was given marked money. He left the car, under the close surveillance of Officer Guerra, for the obvious purpose of contacting one who would sell him illegal drugs. He met the defendant on a street corner and walked to a nearby restaurant. The defendant entered the restaurant alone and came back to where he had left Fields waiting. It was then that Officer Guerra observed the exchange of hands between Fields and the defendant and saw the two men separate. Under these particular circumstances, we believe that the defendant's arrest was based upon probable cause and was in no way unreasonable. See People v. Macias, 39 Ill.2d 208, 213, 234 N.E.2d 783, 786-7 (1968), cert. denied, 393 U.S. 1066 (1969).

Defendant also contends that the court erred by admitting into evidence the money which was recovered from the defendant at the time of his arrest. He asserts that a proper foundation had not been provided for the introduction of this evidence because no list of pre-recorded serial numbers or other indication of prior inventory was produced by the State. Testimony at trial, however, established that the money was marked before it was given to Fields by Officer Rigoni. This marked money was found in the defendant's possession at the time of his arrest and it was positively identified by the markings during the trial. A sufficient foundation had been provided, therefore, for the introduction into evidence of the money in question.

Defendant's final contention is devoid of merit because, as we have indicated, the proof established the guilt of the defendant beyond a reasonable doubt. The testimony of Fields, the "third person," was unnecessary under the facts of this case and his absence at trial did not deprive the defendant of a fair trial. See People v. Banks, 116 Ill. App.2d 147, 253 N.E.

54439-54637

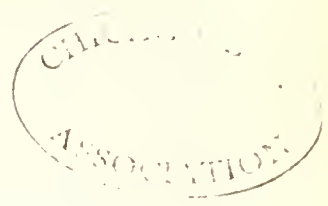
2d 631 (1969).

The judgment of the lower court is affirmed.

JUDGMENT AFFIRMED.

MC CORMICK, P.J., and BURKE, J., concur.

131 ILL. APP. 2 559



54835

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Appellee,	)	APPEAL FROM THE CIRCUIT
	)	COURT OF COOK COUNTY.
vs.)	
)	
RAUL GAYTAN (Impleaded),	)	Hon. L. Sheldon Brown,
	)	Presiding.
Appellant.)	

MR. JUSTICE LYONS DELIVERED THE OPINION OF THE COURT.

Raul Gaytan entered pleas of guilty to charges that he committed the offenses of attempt, murder (indictment 69-2974), aggravated battery (indictment 69-2984), and murder (indictment 69-2985). The trial court accepted the pleas and, following the admission into evidence of a stipulation of facts, found the defendant guilty of each of the offenses charged. Judgments were entered on the findings on each indictment and defendant was sentenced to terms of four to seven years for the attempt, murder, three to five years for the aggravated battery, and eighteen to thirty-five years for the murder, the sentences to run concurrently.

The public defender, appointed to prosecute defendant's appeal, has filed a motion for leave to withdraw as appellate counsel based on his determination that there exists in the record no issue upon which an appeal might be founded. Pursuant to the dictates of Anders v. California, 386 U.S. 738 (1967), the public defender has also filed a brief setting forth the single issue which he believes might conceivably support an appeal: that the defendant was not properly admonished by the trial court of the consequences of entering pleas of guilty to the charges prior to the court's acceptance of the pleas.

The defendant was advised by this court of appointed counsel's motion for leave to withdraw and was given sixty days in which to file any points which he might choose in support of

his appeal. He has responded with a brief raising the single issue of whether the trial court's admonition with respect to the consequences of entering a plea of guilty to the charge of murder (indictment 69-2985) was sufficient under section 115-2(a) of the Code of Criminal Procedure (Illinois Revised Statutes (1969), Chapter 38, section 115-2(a)) and Supreme Court Rule 401(b). He points out that the trial court did not advise him with respect to the maximum penalty prescribed for the offense of murder, the penalty of death.

The thrust of the above statute and rule is that a plea of guilty should be accepted by the court only after it is satisfied that the accused understands the nature of the charges against him and the consequences of pleading guilty thereto, including the waiver of the right to be represented by counsel and trial by jury. The statute also directs the court to inform the accused of the maximum penalty provided by law for the offense charged. While it is true that the trial court failed to advise defendant that the statute allows the penalty of death to be imposed in murder cases, we see no resultant prejudice to the defendant. He does not suggest that inclusion of that information in the court's admonition would have induced him to withdraw his plea, and the sentence of eighteen to thirty-five years imposed is well within the admonition given by the court when it said:

Now on indictment No. 69-2985, charging you with murder, I could sentence you to the penitentiary for a term of not less than fourteen years and any number of years thereafter, up to and including and beyond two hundred years. Knowing this, do you still persist in your plea of guilty to that indictment?

The record before us indicates that the admonitions given defendant were adequate in every other respect. The court questioned the defendant regarding his knowledge of what a jury trial is, his entitlement thereto, and the consequences of persisting

in his plea of guilty. The responses of defendant clearly indicate that he was aware of his rights and that entry of pleas of guilty constituted waivers of those rights. Further, the court determined that defendant had received the advice of counsel with respect to the pleas and that he was satisfied with that advice.

We conclude that the admonition given defendant with respect to each of the crimes charged was sufficient. In addition, our own comprehensive examination of the record compels us to agree with counsel that there exists no other issue which might conceivably support an appeal.

Accordingly, the motion of the public defender for leave to withdraw is allowed and the judgments of conviction are affirmed.

MOTION FOR LEAVE TO WITHDRAW
ALLOWED AND JUDGMENTS AFFIRMED.

MC CORMICK, P.J., and BURKE, J., concur.

ABST

131 ILL. APP. 2 563

54841

PEOPLE OF THE STATE OF ILLINOIS,)

Appellant,) APPEAL FROM THE CIRCUIT
) COURT OF COOK COUNTY.

vs.)

DONALD J. PRATL,)

HONORABLE FELIX M. BUOSCIO,
Presiding.

Appellee.)

MR. JUSTICE STAMOS DELIVERED THE OPINION OF THE COURT.

The State appeals from an order which allowed defendant's motion to quash a search warrant and suppress the evidence seized pursuant to the warrant. Defendant has filed no brief. This appeal presents two issues for consideration:

1. Did the complaint for search warrant sufficiently allege the reliability of the undisclosed informant to establish probable cause?
2. Did the search warrant particularly describe a definitely ascertainable place to be searched?

The trial court entered its order prior to People v. Mitchell, 45 Ill.2d 148 (1970), and this court's opinion in People v. Perlman, 126 Ill. App.2d 481 (1970). The allegations in the complaint at bar and those in the foregoing cited cases are practically identical and therefore, we find the complaint legally sufficient.

We also find that the following description of the premises to be searched, "4312 So. Ashland Ave., 1st rear, Chicago, Illinois" sufficiently descriptive to enable the police officer with reasonable effort to identify the place to be searched. People v. Watson, 26 Ill.2d 203 (1962). Therefore, we reverse the order of the trial court quashing the search warrant and suppressing the evidence and remand the cause for such other and further proceedings as are consistent with the views herein expressed.

ORDER REVERSED AND CAUSE REMANDED WITH DIRECTIONS.

LEIGHTON, P.J., and McCORMICK, J., concur.

ABST. ONLY.



No. 55196

PEOPLE OF THE STATE OF ILLINOIS,)	
Plaintiff-Appellee,	)	APPEAL FROM THE CIRCUIT
v.	)	COURT OF COOK COUNTY.
JUSTIN THOMAS,	)	Hon. Daniel J. Ryan,
Defendant-Appellant.	)	Presiding.

MR. PRESIDING JUSTICE McNAMARA DELIVERED THE OPINION OF THE COURT.

Defendant Justin Thomas was indicted for burglary, and at arraignment entered a plea of not guilty. When the case came on for trial, defendant, represented by the public defender, withdrew his plea of not guilty and pleaded guilty. The evidence was stipulated, and defendant was sentenced to the penitentiary for a term of three to five years.

Subsequently defendant filed his notice of appeal, and the public defender was appointed to represent him on appeal. The public defender now seeks to withdraw. He has filed a brief in support of his motion pursuant to the case of Anders v. California, 386 U.S. 738 (1967), and states that from a review of the record the only basis for appeal would be whether the trial court fully admonished the defendant as to the significance and consequences of his plea of guilty. The public defender concludes that the trial court properly admonished defendant, and that an appeal would be without merit.

Defendant received a copy of the public defender's motion and brief. He was also sent a letter by this court notifying him of the motion and giving him an opportunity to file any points he might choose to support his appeal. No response has been received from him.

After a complete examination of the record, we have concluded that the public defender is correct and that there is no merit to this appeal. The trial court fully informed defendant of his right to a jury trial, of the minimum and maximum sentences for the charge of burglary and of the consequences that could follow his plea of guilty. When defendant persisted in his plea of guilty, it was accepted.

The motion of the public defender to withdraw as counsel for defendant is allowed and the judgment is affirmed.

JUDGMENT AFFIRMED.

DEMPSEY and SCHWARTZ, JJ., concur.

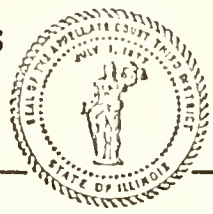
ABST

131 ILLAPP2-692.

69-124

STATE OF ILLINOIS

MAURICE J. SILVERSTEIN VS ETHEL RHODES



APPELLATE COURT THIRD DISTRICT
OTTAWA

At a term of the Appellate Court, begun and held at
Ottawa, on the 1st Day of January in the Year of our Lord
one thousand nine hundred and seventy-one, within and for the
Third District of Illinois:

Present—

HONORABLE ALLAN L. STODER, Presiding Justice

HONORABLE DAN H. MCNEAL, Justice

HONORABLE ALBERT SCOTT, Justice

JOHN E. HALL, Clerk

JAMES A. CALLAHAN, Sheriff

BE IT REMEMBERED, that afterwards on
FEBRUARY 18, 1971 the Opinion of the
Court was filed in the Clerk's Office of said Court, in the
words and figures following, viz:

In The

APPELLATE COURT OF ILLINOIS

Third District

A.D. 1971

MAURICE J. SILVERSTEIN,

Plaintiff-Appellant.

vs.

ETHEL D. RHODES,

Defendant-Appellee.

Appeal from the
Circuit Court of
Peoria County, Illinois

Honorable
J. E. Richards
Judge Presiding

STOUDER, J.

Abstract

Plaintiff-Appellant, Maurice Silverstein, brought this action in the Circuit Court of Peoria County seeking damages resulting from the alleged negligent operation of her automobile by the Defendant-Appellee Ethel Rhodes. The jury found defendant not guilty, judgment was entered on the verdict and plaintiff's motion for post trial relief was denied. The only issue raised on this appeal is the sufficiency of the evidence to support the jury's verdict.

On the thirtieth day of June, 1965, at approximately ten thirty in the morning, plaintiff was driving his automobile in a general southerly direction on South West Jefferson Street near its intersection with Jackson Street, both being public streets in the City of Peoria, Illinois. Jefferson Street, at its intersection with Jackson Street, is a four lane principal thoroughfare accomodating one-way traffic. Jackson Street intersects South West Jefferson Street at a ninety degree angle. At the time and on the date noted, a stop sign had been erected and was in place on Jackson Street requiring vehicular traffic traveling in a general easterly direction to stop before entering onto South West Jefferson. The defendant, driving her automobile on Jackson Street,,entered into and upon

South West Jefferson Street and collided with the automobile being driven by the plaintiff.

Notwithstanding plaintiff's argument that the verdict is not supported by the evidence it is our conclusion that there is sufficient evidence from which conflicting inferences may be drawn requiring and supporting the resolution of such issues by the jury. In examining the evidence under the standard announced in *Pedrick v. Peoria & Eastern R.R. Co.*, 37 Ill. 2d 494, 229 N.E. 2d 504, the test to be applied requires consideration of all the evidence in its aspect most favorable to defendant.

In his argument plaintiff has discussed at length the conduct of defendant in disregarding a stop sign favoring traffic on the street and in the direction in which plaintiff was proceeding. The evidence regarding defendant's negligence is substantial and were such negligence the only issue in the case we would be inclined to agree with plaintiff.

However plaintiff's due care or freedom from contributory negligence is an equally important issue and is ignored in his brief. According to defendant after she had entered the intersection, thinking the stop sign was a stop light, she saw plaintiff's car approaching from the left some 100 feet away. She accelerated in an effort to avoid being struck.

According to plaintiff, defendant's car came out of nowhere and he veered to the right as much as he could in an effort to avoid striking defendant's car but collided with the left rear corner of her car.

From such facts the jury could have reasonably inferred that plaintiff was not keeping a proper look out or did not have his car under proper control. Also as disclosed by plaintiff's own testimony, the jury might have inferred that he could or should have applied his brakes in the exercise of due care. During his testimony he first stated that he had applied his brakes but after being confronted with his pretrial deposition in which he indicated the contrary the plaintiff conceded that his earlier statement was more probably the truth. Even though a jury might have found from such evidence that plaintiff was in the exercise of due care the contrary inference is not unreasonable and accordingly such conflict was appro-

priately submitted to and resolved by the jury.

Finding no error in the judgment of the Circuit Court of Peoria County said judgment is affirmed.

JUDGMENT AFFIRMED.

Scott, J. and
McNeal, J. concur.

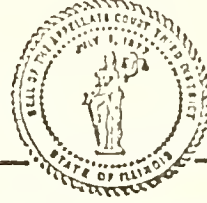
ABST.

131 ILL APP 2 78

70-45

STATE OF ILLINOIS

W.C.BROOKS VS. GREAT AMERICAN INSURANCE CO.



APPELLATE COURT THIRD DISTRICT
OTTAWA

At a term of the Appellate Court, begun and held at
Ottawa, on the 1st Day of January in the Year of our Lord
one thousand nine hundred and seventy-one, within and for the
Third District of Illinois:

Present—

HONORABLE JAY J. ALLOY, Presiding Justice

HONORABLE ALLAN L. STOUDEER, Justice

HONORABLE ALBERT SCOTT, Justice

JOHN E. HALL, Clerk

JAMES A. CALLAHAN, Sheriff

BE IT REMEMBERED, that afterwards on

FEBRUARY 18, 1971 the Opinion of the

Court was filed in the Clerk's Office of said Court, in the
words and figures following, viz:

In The
APPELLATE COURT OF ILLINOIS
Third District

A.D. 1971



W. C. BROOKS,)	
)	
Plaintiff-Appellee,	)	Appeal from the
	)	Circuit Court of
vs.	)	The Tenth Judicial
	)	Circuit, Tazewell
GREAT AMERICAN INSURANCE COMPANY,	)	County, Illinois.
a Corporation,)	
	)	Honorable John D.
Defendant-Appellant.	)	Sullivan,
	)	Judge Presiding.

STOUDER, J.

Abstract

Plaintiff-Appellee, W. C. Brooks, brought this action in the Circuit Court of Tazewell County seeking to recover on an insurance policy issued by Defendant-Appellant, Great American Insurance Company. After a bench trial the court entered judgment in favor of plaintiff for \$1,764.99 and costs and also awarded plaintiff \$440.00 as attorney's fees from which judgment this appeal follows.

The underlying pertinent facts giving rise to this cause of action are substantially undisputed. Plaintiff was in the trucking business with his principal place of business at Minier, Illinois. On February 15, 1967, one of plaintiff's trucks overturned near Dwight, Illinois, in a one vehicle mishap. At the time the truck was transporting one hundred forty (140) hogs to Detroit, Michigan, the hogs being the property of Heinhold Hog Market, Inc. As a result of the mishap twenty two (22) of the hogs died and according to plaintiff the remainder sustained shrinkage and injury damage.

At the time of the aforementioned incident plaintiff was the named insured in an Inland Marine policy issued by defendant. Heinhold demanded payment of its loss from plaintiff and plaintiff in turn requested that defendant adjust and settle

such loss which defendant declined to do. Subsequently on July 12, 1967, plaintiff personally settled his dispute with Heinhold by paying the latter \$1,460.00. Of such amount \$900.00 represented the value of dead hogs and the remainder represented damages occasioned by shrinkage and injury. After making his remittance to Heinhold plaintiff filed this present action on February 20, 1968.

In a motion to dismiss the complaint and thereafter in its answer the defendant set forth two affirmative defenses. The first of these defenses alleged that the action was barred by lapse of time because not commenced within twelve months from date of loss as required by the policy. In its second affirmative defense the defendant alleged the loss was covered by a policy issued by the Hartford Accident Insurance Company. By denying the motion to dismiss the complaint and striking the affirmative defenses from the answer the trial court concluded that neither of the affirmative defenses constituted a defense as a matter of law. Such rulings are assigned as error by defendant in this appeal. Further defendant argues the trial court erred in failing to apply a limitation provision of its policy which afforded coverage only for dead animals. Also according to defendant its failure to settle the claim was not vexatious but that on the contrary a reasonable dispute existed between the parties.

On the authority of *Pierce v. Standard Accident Ins. Co.*, 70 Ill. App. 2d 224, 216 N.E. 2d 818, we believe the trial court correctly determined the limitation period had not expired. We have no quarrel with appellant's argument that a twelve month limitation period may be valid and enforceable but when such period commences to run as described in the *Pierce* case is not contradicted by cases cited by appellant applying the limitation period to dissimilar factual situations.

With respect to the court's action on the other affirmative defense we likewise are unable to find any error in the court's decision. Appellant argues, relying on *New Amsterdam Casualty Co. v. Certain Underwriters at Lloyds, London*, 34 Ill. 2d 424, 216 N.E. 2d 663, that a policy issued by Hartford Accident provided the primary coverage and only coverage under the "other insurance clauses" of the policy

This argument does not appear to have been made in the trial court although appellant seeks to overcome this difficulty by suggesting that the affirmative defense made the Hartford policy "relevant". Furthermore in its brief the appellant does not refer to the language of the clauses involved but rather alludes to the conclusion that its policy afforded excess coverage only. Under these circumstances the second affirmative defense did not constitute a defense to the plaintiff's claim.

Next we consider appellant's claim that the trial court erred in including in the judgment damages for other than the value of the dead animals. In this respect we agree with appellant that the court did err in this regard.

It was and is appellee's theory that the limitation to loss of dead animals only was abrogated or amended by an endorsement commonly known as a commercial cargo endorsement. Such an endorsement embodies provisions required by statute. In general the statute requires as does the endorsement that the insurer is liable to a cargo owner for losses or damage caused by the carrier to the extent of \$1,000.00. Although it is true as contended by appellee that such endorsement does not limit the insurer's liability to dead animals only, the purpose of the endorsement is to provide additional protection to a cargo owner and it does not purport to modify or change the provisions of the underlying policy. A specific provision of the endorsement requires that the insured (carrier) indemnify the insurer with respect to any amounts paid by the insurer under the endorsement for which the insurer is not liable under the principal policy. Accordingly it is our view that the limitation of the policy to loss for dead animals only was applicable and the court erred in holding to the contrary. It also follows that a bonafide dispute did exist between the parties and consequently an award of attorney's fees is also improper.

Since there does not appear to be any dispute but that the value of the dead animals was \$900.00 we believe that the errors in the trial court judgment can best be remedied by reducing the judgment of said court to \$900.00 and as such the judgment is affirmed.

JUDGMENT MODIFIED AND AS MODIFIED AFFIRMED.

Alloy, P.J., and
Scott, J. concur.



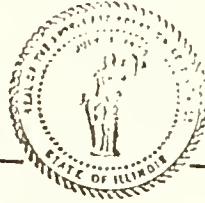
ABST

131 ILL APP² 841

70-67

STATE OF ILLINOIS

CAROL STEVENS VS. ANIMO, INC.



APPELLATE COURT THIRD DISTRICT
OTTAWA

At a term of the Appellate Court, begun and held at
Ottawa, on the 1st Day of January in the Year of our Lord
one thousand nine hundred and seventy-one, within and for the
Third District of Illinois:

Present—

HONORABLE JAY J. ALLOY, Presiding Justice

HONORABLE ALLAN L. STOUDER, Justice

HONORABLE ALBERT SCOTT, Justice

JOHN E. HALL, Clerk

JAMES A. CALLAHAN, Sheriff

BE IT REMEMBERED, that afterwards on
March 23, ¹⁹⁷¹ 1967 the Opinion of the
Court was filed in the Clerk's Office of said Court, in the
words and figures following, viz:

A.D. 1971

VS.

Defendants-Appellees.

Honorable
J. E. Richards
Judge Presiding

Abstract

After the default order plaintiffs' attorney corresponded with defendants' insurer and certain correspondence and negotiations took place thereafter, the insurer claiming it had no prior knowledge of the legal action. Thereafter some forty-two days after the entry of the default order, defendants filed their petition seeking relief under Chap. 110, Section 72, Ill. Rev. Stat. 1969. Over objection of plaintiffs and after hearing, the trial court granted the relief requested and vacated its prior order and granted defendants leave to answer the

complaint. Plaintiffs have appealed such ruling arguing that the action was not warranted by provisions of Section 72.

Although the petition which is the basis of this appeal alleged it was filed and sought relief under Section 72, Chap. 110, Ill. Rev. Stat. 1969 and the parties have cited cases dealing with the application of said Section, an examination of the Court action reveals the default order of December 17, 1969, was not a final appealable order and hence reconsideration and vacation thereof was not governed by procedures relating to vacation of final judgments, the only subject matter of Section 72 petitions. As noted above only a default order was entered as distinguished from a judgment for damages, the relief sought in the action. Accordingly the reconsideration of the default order does not result in a reviewable order and it is immaterial whether such reconsideration was in accord with Section 72 or not.

For the foregoing reasons this appeal is dismissed.

APPEAL DISMISSED.

Alloy, P.J. and
Scott, J. concur.



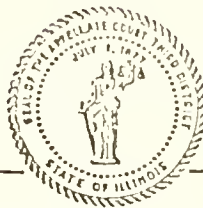
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ABST

131 ILLAPP² 899

70-181

STATE OF ILLINOIS

TERRY HARVEY VS. CHARLES SWEAT



APPELLATE COURT THIRD DISTRICT
OTTAWA

At a term of the Appellate Court, begun and held at
Ottawa, on the 1st Day of January in the Year of our Lord
one thousand nine hundred and seventy-one, within and for the
Third District of Illinois:

Present—

HONORABLE JAY J. ALLOY, Presiding Justice

HONORABLE ALLAN L. STODER, Justice

HONORABLE ALBERT SCOTT, Justice

JOHN E. HALL, Clerk

JAMES A. CALLAHAN, Sheriff

BE IT REMEMBERED, that afterwards on

 MAY 11, 1971 the Opinion of the

Court was filed in the Clerk's Office of said Court, in the
words and figures following, viz:

In The
APPELLATE COURT OF ILLINOIS

Third District

A. D. 1971.



TERRY HARVEY,	)	Appeal from the Circuit
	)	Court of the Fourteenth
Plaintiff-Appellee,	)	Judicial Circuit, Rock
	)	Island County, Illinois.
vs.)	
)	
CHARLES SWEAT,)	
	)	Honorable
	)	Ivan Lovass,
Defendant-Appellant.	)	Magistrate Presiding.

ALLOY, P. J.

Abstract

The action in the cause before us was instituted to recover damages occasioned when a tree belonging to defendant fell on to the automobile of plaintiff. The cause was tried without a jury in the Small Claims Court and judgment was entered for the plaintiff in the sum of \$500.

Plaintiff Terry Harvey rented an apartment from defendant Charles Sweat. He habitually parked one of his automobiles at the rear of the dwelling in which he lived. Plaintiff owned two automobiles and, in his rental negotiations with defendant, it was agreed that plaintiff could park one of his automobiles in the rear as the owner preferred to have only one tenant automobile at a time parked in front of the building. Plaintiff, therefore, customarily parked his automobile on the rear lot beneath a certain tree. It is not clear what happened at the time the tree fell as

there was no specific information as to any unusual or extraordinary weather conditions. The tree may simply have fallen because of its condition. The record shows that defendant knew that limbs had fallen off the tree prior to October 1, 1969, and that it was in bad condition. Defendant had gotten in touch with someone to cut the tree down, but it was not done before it fell on plaintiff's automobile. There was evidence that plaintiff called defendant at his place of employment after the tree fell and that plaintiff said, "Mr. Sweat, this is Mr. Harvey", and that Sweat's reply was, "Did my tree fall on your car?".

On appeal in this Court defendant contends that plaintiff was at most a licensee and not an invitee, and that defendant was not under a duty to use ordinary care to keep his property in a reasonably safe condition for the use of the licensee, but only to refrain from wilfully or wantonly injuring such licensee (MARCOVITZ v. HERGENRETH, 302 Ill. 162).

From the record it is apparent that plaintiff parked his automobile under the tree almost every day over a 5-month period. It is also apparent from the record that defendant knew that the tree was in bad condition and should have been removed. Defendant did not post a notice near the tree nor did he advise plaintiff of the condition of the tree. There was also no evidence that plaintiff was aware of the condition of the tree, so that there is no basis for the contention that plaintiff was contributorily negligent as a matter of law.

It is apparent from the record that regardless of whether plaintiff was an invitee or only a licensee, as defendant contends, there was enough evidence before the court of defendant's knowledge of the dangerous condition of the tree to justify the magistrate in finding for the plaintiff as

against defendant, as a result of damage to the automobile. As we concluded in SCHOEN v. HARRIS, 108 Ill. App. 2d 186, 246 N.E.2d 849, an owner, even though under no obligation to discover unsafe conditions on his premises, is under a duty to disclose or warn against hidden dangers of which he has knowledge. Failure to do so may constitute wilful and wanton misconduct.

Since we find no reversible error in this cause, the judgment of the Circuit Court of Rock Island County will be affirmed.

Affirmed.

Stouder, J. and Scott, J. concur.



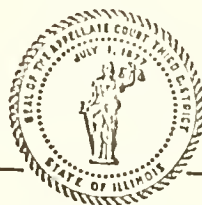
ABST

131 ILLAPP²904.

70-207

STATE OF ILLINOIS

ST. JOSEPH HOSPITAL VS. PEGGY HOMOLA



APPELLATE COURT THIRD DISTRICT
OTTAWA

At a term of the Appellate Court, begun and held at
Ottawa, on the 1st Day of January in the Year of our Lord
one thousand nine hundred and seventy-one, within and for the
Third District of Illinois:

Present—

HONORABLE JAY J. ALLOY, Presiding Justice

HONORABLE ALLAN L. STOUDER, Justice

HONORABLE ALBERT SCOTT, Justice

JOHN E. HALL, Clerk

JAMES A. CALLAHAN, Sheriff

BE IT REMEMBERED, that afterwards on

MAY 11, 1971

_____ the Opinion of the
Court was filed in the Clerk's Office of said Court, in the
words and figures following, viz:

No. 70-207

In The

APPELLATE COURT OF ILLINOIS

Third District

A. D. 1971.



AN ASSOCIATION OF FRANCISCAN)
SISTERS OF THE SACRED HEART,)
AN ILLINOIS CORPORATION, d/b/a)
ST. JOSEPH HOSPITAL,)
Plaintiff-Appellée,)
vs.)
PEGGY HOMOLA,)
Defendant-Appellant.)

Appeal from the Circuit
Court of Will County,
Illinois.

Honorable
Emil DiLorenzo,
Judge Presiding.

ALLOY, P. J.

Abstract

Plaintiff, St. Joseph Hospital, filed an action to recover money for the value of goods and services alleged to have been supplied to defendant Peggy Homola by the hospital. It appears that defendant was involved in an automobile accident in which she was injured. She was admitted to St. Joseph Hospital on April 5, 1968. She was confined in the hospital from April 5, 1968, through May 14, 1968, and again from August 28, 1968, through September 2, 1968. During that period of time defendant was given the use of certain hospital facilities including x-rays, pharmaceutical items, laboratory facilities, blood transfusions, casts, operating rooms, and nursing care. Bills for the charges were sent to defendant and her attorney but the bills were not paid. On January 18, 1970, the complaint in the action was filed against defendant by plaintiff. Defendant appeared by an attorney, who

later withdrew from the case. Thereafter, defendant appeared pro se. After a number of court appearances based upon the pleadings, the answer of defendant, defendant's answer to interrogatories, Request to Admit Facts and Genuineness of Documents and answers thereto, the trial court, acting on plaintiff's motion for summary judgment, entered judgment for \$3,289.55 and costs in favor of plaintiff and as against defendant.

The complaint alleged that certain services were performed and furnished to defendant Peggy Homola. The answer admitted the furnishing of such services but denied that the services were of the value of \$3,289.55. Interrogatories were then propounded to defendant and answers to the interrogatories were filed. The answers admitted under oath that defendant had been a patient in the hospital and had received the services referred to. Thereafter, on July 21, 1970, a request to admit the facts was filed and served upon defendant. No sworn answers or denials to such request were filed with the court on or before 28 days from the date of service. Pursuant to Supreme Court Rule 216 (c) [1969 Illinois Revised Statutes, Ch. 110A §216(c)] each of the matters of fact and the genuineness of each document (as to which admission was requested) is deemed to be admitted, unless a sworn denial or objection is served within the 28-day period specified in such Rule. In one such request, defendant was requested to admit that \$3,289.55 was the reasonable and customary value of the services furnished. No sworn denial or objection was filed thereto. Plaintiff's motion for summary judgment was never answered or objected to by defendant. The motion for summary judgment was allowed by the court on the premise that there was no genuine issue as to any material fact and that the hospital was entitled to judgment as a matter of law.

On appeal in this Court, defendant contends that the court erred in granting plaintiff's motion for summary judgment when the record showed

that there were issues as to material facts. It is contended that although defendant admitted that she had received the services performed, in one answer she stated that the operation was a failure resulting from "malpractice and negligence" of the hospital staff. No specific facts were alleged as to the nature of the "malpractice and negligence" referred to. Defendant also stated in one of her answers to an interrogatory that her legs were placed in casts and were "negligeable and improperly casted". She also stated in the answer to one of the interrogatories that she was wrongfully and prematurely discharged on May 14, 1968, and that her second stay in the hospital was occasioned by a recurrence of her former condition resulting from the "malpractice" of the hospital staff.

No set-off or counterclaim was filed by defendant in this cause. It appears from the record that all of the elements of a cause of action for recovery of the reasonable value of goods and services were alleged and established, and no facts were asserted which specifically contradicted such claim, either in the answers to the interrogatories or admissions of fact filed in this cause. No specific denial of facts alleged was made by defendant. While the answers to interrogatories did allege "malpractice of the hospital staff", no facts supporting such conclusions were alleged or stated, nor as indicated, was there a set-off or counterclaim filed in the cause. The answers to interrogatories could be characterized as conclusions and unresponsive to the interrogatories. No affidavits were filed raising any genuine issues of fact, nor was there any specific allegation showing a defense to the claim for services. There were no affidavits filed in opposition to the motion for summary judgment pursuant to Supreme Court Rule 191 (1969 Illinois Revised Statutes, Ch. 110A §191).

On the basis of our review of the entire record, therefore, it appears that the trial court could have properly concluded that there was no genuine issue as to any material fact and that plaintiff was entitled to

a judgment as a matter of law (GASS v. CARDUCCI, 52 Ill. App. 2d 394, 202 N.E.2d 73). Accordingly, the entry of summary judgment by the trial judge will be affirmed.

Affirmed.

Stouder, J. and Scott, J. concur.

131 ILL APP 907

FILED

STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT

APR 16 197

Robert L. Conn. CLERK
APPELLATE COURT 4TH DISTRICT

General No. 11169

Agenda No. 71-1

People of the State of Illinois,
Plaintiff-Appellee

vs.

Appeal from
Circuit Court
Adams County

Thomas Gale Tittsworth,
Defendant-Appellant

CRAVEN, J., delivered the opinion of the court.

Defendant was convicted of robbery and involuntary manslaughter. Upon his plea of guilty, sentence of not less than ten nor more than twenty years was imposed upon the robbery conviction and a sentence of not less than five nor more than ten on the involuntary manslaughter conviction. The sentences were made concurrent. Upon motion made and allowed by this court, a delayed notice of appeal was filed.

Counsel appointed by the circuit court has filed a motion in this court for leave to withdraw. This motion was accompanied by a statement in accord with the case of Anders v. California, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967), wherein counsel suggests that the only arguable points presented by this

record in support of the appeal are that the court failed to advise the defendant that he had the right to waive a jury trial and be tried by the court, and further that the court failed to ask the defendant at the time his plea of guilty was accepted whether any promises of leniency or reduction in sentence had been made.

The offenses here involved occurred on September 7, 1968.

Count I of the information charges that the defendant recklessly struck and beat one Edward Klatt in a manner likely to cause great bodily harm, and that as a result of such striking the victim died. The robbery count of the information relates to the taking by use of force personal property from Klatt on the same date. At the time of the filing of the information and the plea of guilty, robbery and murder indictments were pending against the defendant arising out of this transaction.

In order to pass upon the motion, we have examined this record and conclude that an appeal in this case would be frivolous and without merit. Defendant had the assistance of counsel at all stages of the proceeding. He was fully informed of the charges against him, stated that he understood the charges, was fully informed of his rights--both procedural and substantive--and was fully admonished as to the consequences of a plea of guilty. There is no suggestion that any coercion, force or promise--direct or by implication--motivated the ultimate plea of guilty. The admonition with which we are here concerned was thorough and complete. See: People v. Newell, 41 Ill. 2d 329, 243 N.E.2d 200 (1969); People v. Kontopoulos, 26 Ill. 2d 388, 186 N.E.2d 312 (1962).

We note from this record a narrative recitation of the facts made to the court at the time of the waiver of jury and sentencing. From our examination of such recitation, we cannot say that both offenses here involved are not independently motivated or otherwise separable so as to preclude concurrent sentences within the decision of People v. Whittington, 46 Ill. 2d 405, 265 N.E.2d 679 (1970). A valid plea of guilty waives all factual and non-jurisdictional procedural defects. The plea admits every material fact alleged in the information and all elements of the crime charged. 14A I.L.P., Criminal Law, sec. 205. Thus, this record is sufficient to sustain the concurrent sentences imposed.

Defendant was afforded an opportunity to file any points he might choose in support of his appeal subsequent to the motion by counsel for leave to withdraw. None were filed. The motion for leave to withdraw is allowed and the judgment is affirmed.

Judgment affirmed.

SMITH, P.J. and TRAPP, J., concur.

FILED

STATE OF ILLINOIS

APR 16 1971

APPELLATE COURT

FOURTH DISTRICT

Robert L. Conn, CLERK
APPELLATE COURT 4TH DISTRICT

General No. 11310

Agenda No. 71-4

ABST

People of the State of Illinois,
Plaintiff-Appellee

vs.

William H. Cole, John R. Cole and
Morris R. Coleman,

Defendants

John R. Cole,

Defendant-Appellant

Appeal from
Circuit Court
Macon County

CRAVEN, J., delivered the opinion of the court.

In October of 1968, the defendant and two other persons riding in a station wagon near Decatur, Illinois, were stopped for a traffic violation. A quantity of copper cable was discovered in the station wagon. Ultimately the defendants signed a voluntary statement to the effect that the cable had been stolen by the defendant and another from a Penn Central storage car in Indiana.

The defendant was indicted in Macon County, Illinois, for the offense of theft of property in excess of \$150 in value in that he knowingly exerted unauthorized control over a quantity of copper wire, property of the Penn Central, with intent to permanently deprive the owner of the property. In February of 1969,

he entered a plea of guilty to this indictment and was placed on probation for a period of two years.

In September of 1969, a probation violation was admitted to by the defendant. That violation of probation resulted in a 30-day jail sentence, and thereafter the defendant resumed his status as a probationer.

In March of 1970, the defendant was again charged with violations of the terms and conditions of his probation. The charged violations were--that he was associating with a known criminal, had consumed alcoholic beverages, and had committed a burglary. The defendant, represented by counsel, admitted to these violations. He waived hearing in mitigation and was sentenced to a term of not less than two nor more than ten years in the Illinois State Penitentiary.

This appeal follows. The Illinois Defender Project, court-appointed appellate counsel, has filed a motion to withdraw accompanied by a brief in accord with the case of Anders v. California, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967). That brief states that three issues are raised by the appeal and concludes that none are meritorious and that further appeal would be frivolous. Those issues are--whether the State proved jurisdiction, whether the defendant was properly admonished, and whether the sentence was excessive.

Section 16-1 of ch. 38, Ill.Rev.Stat.1967, defines the offense of theft in the terminology found in this indictment. Exerting unauthorized control over the property of another, intending to deprive the owner permanently of the use of the property, are elements of the offense of theft. Thus, this statute is not limited to unauthorized taking but also involves unauthorized exercise of control. Thus, in People v. Nunn, 63 Ill. App. 2d 465, 212 N.E.2d 342 (1st Dist. 1965), the Appellate Court of the First District, speaking through Mr. Justice English, observed that this statutory provision is not limited to those instances of theft of property in which only the defendant initiates the wrongful taking but applies generally to persons who knowingly obtain or exert unauthorized control over property when that act is accompanied by the requisite mental state. Further, the term "unauthorized control" has been determined to be valid in the face of an attack on its vagueness. People v. Harden, 42 Ill. 2d 301, 247 N.E.2d 404 (1969). Notwithstanding the fact that this record demonstrates the taking of the property to have been in Indiana, this indictment charged an offense. The defendant, by his plea of guilty, admitted to that offense, and we find no jurisdictional infirmity.

Nor do we find any merit with reference to the issue of the adequacy of the admonition. The defendant was informed of the consequences of his plea, the penalty, and the court made substantial inquiry to ascertain that the plea was voluntarily and

understandingly made. People v. Duncan, 32 Ill. 2d 322, 205 N.E.2d 443 (1965).

Finally, on the issue of the excessiveness of the sentence, this record is wholly insufficient to persuade us that the sentence imposed was not in keeping with reasonable standards for the offense. The trial court was fully informed, and we find nothing in the record that suggests that this court should interfere with the sentence. People v. Nelson, 41 Ill. 2d 364, 243 N.E.2d 225 (1969).

Defendant has been afforded an opportunity to file any points he might choose, upon being notified of the position of his appellate counsel. He did file a letter asserting the lack of jurisdiction. For the reasons stated above, we find such to be without merit.

Having thus examined the Anders brief filed, together with the record, we are of the opinion that this appeal is wholly frivolous. Accordingly, the motion of counsel for leave to withdraw is allowed, and the judgment of the Circuit Court of Macon County is affirmed.

Judgment affirmed.

SMITH, P.J. and TRAPP, J., concur.



ABST

STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT

General No. 11351

Agenda No. 71-7

People of the State of Illinois,
Plaintiff-Appellee

vs.

Corrine A. Whitfield,
Defendant-Appellant

Appeal from
Circuit Court
Macon County

CRAVEN, J., delivered the opinion of the court.

The defendant was indicted for theft of property with a value of less than \$150, but a second offense. In February of 1969, she withdrew an earlier plea of not guilty and entered a plea of guilty to the offense as charged in the indictment. Thereafter, at a hearing on her petition for probation, probation was granted and the defendant was placed on probation for a term of three years.

In November of 1969, the court found that the defendant had violated her probation and sentenced her to 30 days in the county jail for contempt as a consequence of said violation.

In March of 1970, a further violation--deceptive practices--was alleged. This was ultimately dismissed for failure



of the complaining witness to appear.

In May of 1970, the defendant was again charged with a violation of the terms and conditions of her probation in that she allegedly frequented places where intoxicating liquor was sold and that she committed the offense of battery. After a hearing, the trial court determined that she had violated the terms and conditions of her probation by committing the offense of battery but found the evidence insufficient to sustain the charge of frequenting places where intoxicating liquor was sold. Probation was terminated and the defendant was sentenced to a term of not less than one nor more than five years. This appeal is from that sentence.

The Illinois Defender Project was appointed as appellate counsel for the defendant and has filed a motion to withdraw, together with a brief, pursuant to the requirements of Anders v. California, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967), asserting that the only issue raised by this record is whether the defendant was denied procedural due process in her probation-violation hearing. Having concluded that such issue is without merit, it is suggested that this appeal would be frivolous.

Our examination of this record leads us to the same conclusion.

One who is admitted to probation remains subject to the jurisdiction of the court and probation may be revoked

upon compliance with the provisions of sec. 117-3 of ch. 38, Ill.Rev.Stat.1969, and the numerous cases decided thereunder. A defendant is entitled to notice of the violation, to counsel, and to a conscientious judicial determination from the evidence presented as to whether the terms and conditions of probation have been violated. In this case, the hearing and procedure were in accord with these requirements. Evidence was presented as to the offense of battery--being an alleged stabbing--and there is some conflict in the evidence, but at most such presents only a question of credibility of witnesses and this issue was resolved contrary to the defendant's position. The conclusion of the trial court is certainly borne out by the evidence we find in this record.

There is no contention that this sentence is in any way excessive, nor could it be so contended where the trial court fixed the minimum term of imprisonment at the minimum term permitted by the statute.

Defendant has been afforded an opportunity, after the filing of the motion to withdraw, to file any additional suggestions or points she might choose to file in support of her appeal. None have been filed. Our examination of the brief by appellate counsel and of the record leads us to the conclusion that this appeal is wholly frivolous and without merit. The motion

of the Public Defender for leave to withdraw is granted and the judgment of the Circuit Court of Macon County is affirmed.

Judgment affirmed.

SMITH, P.J., and TRAPP, J., concur.

No. 69-131

IN THE

131 ILL. APP² 1032

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT



THOMAS E. JOHNSON,

Plaintiff-Appellee,

-vs-

SHELL OIL COMPANY, a Corporation,

Defendant-Appellant.)

)
) Appeal from the Circuit Court,
) of Madison County, Illinois.

)
) Honorable James O. Monroe,
) Judge Presiding.

ABS

George J. Moran, P.J.

Defendant appeals from a judgment of the Circuit Court of Madison County entered on a jury verdict of \$70,000.00 in favor of the plaintiff for personal injuries sustained on defendant's property and allegedly caused by defendant's negligence.

Plaintiff Thomas E. Johnson was a driver for Stahly Cartage Company which hauled asphalt products in tank trucks from various refineries, including the refinery of defendant, Shell Oil Company at Wood River, Illinois. Defendant maintained a loading facility which, after 1965, was operated by the individual truck drivers. The material being loaded passes through a loading arm which extends out from a loading rack and over the truck being loaded. The loading arm has a handle at the far end and is designed to be manually raised and lowered to accommodate the different sized trucks. At the far end of the loading arm is a smaller spout about three feet long which swivels perpendicularly to the ground. In the loading process this spout is to be turned downward and inserted into the dome aperture in the top of the truck. After the loading process, the loading arm is raised and the spout swiveled upward. These loading arms weigh several hundred pounds. To assist the operator of the loading arm in adjusting it to the truck a heavy counterbalance is connected through a pulley system to the distal end of the loading arm so that when the loading arm is lifted, the counterweight lowers, and conversely, when the arm is lowered the weight is raised. At the time of and prior to plaintiff's injury, the rack on which plaintiff was injured had a metal flange or angle iron welded to the leg of the loading rack about one foot above the ground. This flange

was in a position directly under the counterweight so that when the loading arm was lifted to a certain height, the counterweight would be resting on the flange. After this position was reached, the counterbalance system no longer provided assistance for further lifting the loading arm. The maximum height to which the arm could be raised was sufficient to accommodate the trucks in use during 1950 and subsequent times when the racks were built. The height was not sufficient, however, to accommodate the new and larger trucks in use during the 1960's. Defendant's employees who had manned the loading racks prior to 1965 testified that they had difficulty in loading the larger trucks and would have to have assistance from someone on the ground to kick the counterweight off the flange in order to raise the loading arm to the necessary height or to use some other makeshift method.

On the day of the accident plaintiff was driving one of the larger trucks then coming into general use. He positioned his truck so that the dome aperture would be directly under the loading spout. He got on top of his truck and turned the loading spout downward to insert it into the dome aperture. However the loading arm was not high enough and the spout was two inches below the top of the aperture. Plaintiff reached over and attempted to lift the loading arm by the handle. He could not move it and the strain resulted in a ruptured intervertebral disc requiring surgery. After he climbed down from the truck, plaintiff noticed that the counterweight was resting on the flange and was providing no mechanical assistance at all in lifting the loading arm. It was shown that it would have been a very simple and inexpensive procedure to have cut off these flanges or to have shortened the cable so as to have permitted the loading arm to be raised with mechanical assistance to a height which would accommodate the larger trucks. In fact, after the accident the flanges were cut off to permit the loading arm to be raised higher.

At the close of the trial and following the instruction conference the trial judge read the written instructions to the jury. The jury deliberated from 5:15 p.m. until approximately 6:45 p.m., and after dinner from 7:45 p.m. until approximately 9:00 p.m. At that time the jury summoned the bailiff and requested that they be furnished with the forms of verdict which the trial judge had prepared and which had been read to them. The bailiff contacted the attorneys for the parties who were



still in the court house, although the trial judge was not. It was then discovered that the "given" instructions together with the forms of interrogatories and forms of verdicts were still on the judge's desk and had not been given to the jury. It was expressly agreed by the attorneys and the plaintiff and the representatives of the defendant that the "given" instructions, interrogatories and verdict forms should then be given to the jury by the bailiff. No objection was made by defendant's attorney at that time or at any time until after the verdict was returned in favor of the plaintiff and against the defendant. These facts are not disputed. The trial judge returned to the court house prior to the time the jury completed their deliberations and no objection was made by defendant's attorney. Within an hour after the instructions had been given to the jury they returned a verdict in open court with all parties and their attorneys present. The verdict was read by the court and the jury was polled, each one stating that this was his or her true verdict and no objection regarding this matter was raised by defendant's attorney.

Defendant makes no contention that the verdict is contrary to the manifest weight of the evidence, that plaintiff was not injured, or that the verdict was excessive, but only that the judgment should be reversed or a new trial granted based on certain errors committed during the trial.

Defendant first contends that the trial court committed reversible error in failing to submit the written instructions to the jury until after they had deliberated for more than two and one-half hours, when they indicated that they had already reached a verdict by requesting the verdict forms. Defendant relies on Ill. Rev. Stat., 1967, Chap. 110, Sec. 67(2) which provides that "the original written instructions given by the court shall be taken by the jury to the jury room and shall be returned by them with their verdict to the court," and argues that this section is mandatory and it requires that the jury not reach a verdict without the written instructions. In Shaw v. Close, 92 Ill App 2d 1, the court stated in dictum that it was error for the trial judge to refuse to submit the written instructions to the jury upon request. That case does not indicate whether instructions had been read to the jury, and the case was clearly decided on other grounds.

Defendant argues that he had no choice but to agree to deliver the instructions to the jury when it was discovered that they had not been submitted and that this agreement was "purely and simply a gesture and no more." There is no merit to this contention for counsel stated in an affidavit in support of his post trial motion that "counsel for plaintiff and defendant agreed that the forms of verdict and the written 'given' instructions could be delivered by the bailiff to the jury"; and it is clear that no objection was made until after the verdict was rendered. Notwithstanding the language of Section 67(2), it has been held that the submission of written instructions may be waived by agreement of counsel. *People v. Krakowski*, 308 Ill 266.

Defendant next contends that the trial court erred when it permitted Dr. Earl Holt, one of plaintiff's treating physicians to give his opinion as to what percentage of "physical capacity" the plaintiff lost as a result of the alleged injury. This testimony could only have affected the amount of the damages and since there is no contention that the damages are excessive this contention has no merit.

Defendant next contends that the trial court erred when it refused to permit defendant to examine two employees of the defendant called as witnesses by plaintiff under Section 60 of the Civil Practice Act (Ill. Rev. Stat., 1967, Chap. 110, Sec. 60), immediately after and within the scope of the cross examination by plaintiff. The trial court ruled that defense counsel was entitled to examine his own witness on the subject matter as under direct examination but at a later time. Defendant admits that the trial court is given some discretion on the examination of a witness called under Section 60, but argues that counsel should be permitted to examine a witness immediately after the testimony under Section 60 while the jury presumably has the testimony of the witness clearly in mind.

In *Thompson v. Weible*, 19 Ill App 2d 422, plaintiff called a defendant as an adverse witness under Section 60 and the trial court refused to permit counsel for a co-defendant to cross examine the witness. This ruling was urged as error and the Appellate Court held that while it was error not to have permitted the co-defendant to further examine the witness on matters on which he had been interrogated by plaintiff, relying on *Edwards v. Martin*, 2 Ill App 2d 34, the ruling

did not constitute reversible error. The court pointed out that the question of liability was not a close one and the case was distinguishable from *Cascio v. Bishop Sewer & Water Co.*, 2 Ill App 2d 378, that the plaintiff so far as the record discloses was an innocent party to the ruling, and that the defendant did not testify on her own behalf after the plaintiff rested.

In *Cascio*, *supra*, which involved a situation similar to that in *Thompson*, the court held that the refusal of the trial court to permit examination by a co-defendant of a witness called by plaintiff under Section 60 was reversible error; but the court pointed out that prior statements made by the defendant-witness might or could have been inconsistent with those he made at trial and the record appeared to show that he attempted to explain these inconsistencies and that the trial court's ruling prevented the co-defendant from clarifying the circumstances under which the prior statement had been given. Therefore, co-defendant was entitled to the right to question the witness immediately to clarify his testimony. The court further pointed out that it was a close case and the ruling of the trial court might or could have prejudiced the jury as to the co-defendant.

In the present case neither of the witnesses which the defendant sought to examine were occurrence witnesses. Both testified generally as to the loading operations, including the physical make-up of the loading racks and the usual practices of loading. This testimony was corroborated by other witnesses and neither gave statements which would require immediate explanation. Defendant's attorney has not shown in what manner he has been prejudiced by his inability to examine the witnesses immediately. He did not call them to testify as his own witnesses, nor did he make an offer of proof as to what would be shown by further examination; nor has any contention ever been made, nor does it appear, that this was a close case as to defendant's liability. Under the circumstances, we hold that the rulings of the trial judge did not constitute reversible error. *Thompson v. Weible*, *supra*.

Finally, defendant argues that the trial court erred when it failed to submit to the jury the question whether plaintiff was an invitee or licensee on defendant's premises. The court refused defendant's Instruction No. 3 defining "licensee" and

defendant's Instruction No. 4 that "an owner is not obliged to exercise ordinary care for the safety of the licensee," and gave its own instruction that "it was the duty of the defendant before and at the time of the occurrence to use ordinary care to keep its property reasonably safe for the use by the plaintiff." The court's instruction that the defendant was under a duty of ordinary care is tantamount to an express finding that the plaintiff was an invitee as a matter of law and was correct under the evidence.

Accordingly, finding no reversible error in this record, the judgment of the Circuit Court of Madison County is affirmed.

Judgment Affirmed.

CONCUR:

Honorable Edward C. Eberspacher

Honorable Leland Simkins

PUBLISH ABSTRACT ONLY.

FILED
NOV 19 1973

Walter T. Simkins



131 ILL. APP. 2-1032

No. 69-155

IN THE
APPELLATE COURT OF ILLINOIS
FIFTH DISTRICT

MAR 8 - 1971

ILLINOIS POWER COMPANY, a
Corporation,

Plaintiff-Appellee,

VS.

VIRGIL A. RANGE, Individually and as
Husband of Norma D. Range; NORMA D.
RANGE, Individually and as Wife of Virgil
A. Range; UNITED STATES OF AMERICA,
Acting Through the Farmers Home Adminis-
tration, et al., and THE NORTH SHORE
NATIONAL BANK OF CHICAGO, a
National Banking Association of
Chicago, Illinois, et al.,

Defendants-Appellants.

Appeal from the Circuit Court of
the Twentieth Judicial Circuit,
Monroe County, Illinois.

Honorable Alvin H. Maeys, Jr.,
Presiding Judge.

EBERSPACHER, P. J.

Appeal by the defendant Virgil Range and Norma Range from a jury verdict in condemnation proceeding in the amount of \$900.32 for compensation for land taken. The defendants not herein appearing are interested under mortgages on the defendant Ranges's land.

The plaintiff Illinois Power Company as part of a project to construct power lines from Baldwin, Illinois to Cahokia, Illinois brought this action to obtain a perpetual easement over and across a strip of land owned by the defendants for the purpose of constructing, operating and maintaining an electric transmission line thereon.

The defendants filed a cross-petition for the assessment of damages to land not taken, owned by them, outside of the easement strip. The plaintiff, by answer, denied damage to the defendants' land outside of the easement strip. At the conclusion of the evidence the trial court directed a verdict against the defendants counterclaim for damage to the land not actually taken.

The cause was tried to a jury who heard the evidence, viewed the premises, and returned a verdict awarding compensation for that part of defendants' property occupied exclusively by a tower structure and that part of the property a part of the easement strip not occupied by the tower structure. The total easement strip contains 1.49 acres of the 44.6 acres total of defendants' land.

The easement that the plaintiff obtained was a strip of land 165 feet wide with one transmission tower actually to be constructed upon the defendants' land within the easement strip. The tower will be 25 feet square rising 94 feet with a 55 foot cross-arm from which will be suspended three double conductors. The transmission lines will vary in height from 71 feet at the tower to 52 feet minimum at the middle of the 1,000 foot span between the towers.

The easement itself is entirely within Monroe County although the defendant's land lies both in Monroe and St. Clair Counties.

The land at the time of the action, was used solely for farming. The plaintiff produced testimony that the value of the land over which the easement was taken based upon such usage was between \$660.00 and \$903.93.

The defendants produced testimony that the tract has been used for agriculture purposes. The tract is shaped in the form roughly of a square with the easement crossing the southwest corner. There is a public road along the west side. The land, because of its contours could be developed into a lake site by the construction of a dam. Defendants' Exhibit #1 which purported to show the location of such a lake with a proposed dam indicated, and the water level, was objected to by the plaintiff as a future imaginary use and the court sustained the objection. The defendants asserted that other witnesses would be offered to testify as to the highest and best use of the land being for a lake site. The court also sustained objection to the exhibit upon its being re-offered near the end of the defendants' case.

Defendants' witnesses as to the best possible use of the land at the time in question were not allowed to testify after plaintiff's various objections were sustained.

At the conclusion of the evidence the matter was submitted to the jury on the

question of compensation for the part of the property occupied by the proposed structure to be placed within the easement, and compensation for the perpetual easement. The instructions submitted provided only for those elements to be considered. The defendants did not object to the instructions as given.

There is no dispute as to the right of the plaintiff to condemn the easement or the pleadings of this cause.

The defendants have based this appeal upon the three points wherein the defendants assert the trial court committed prejudicial error. These assertions we shall consider in order. First, did the court err in refusing to admit defendant's Exhibit #1 into evidence? We do not find that this refusal was in error. The defendants correctly state in their brief: "The owner of Land in a condemnation proceeding is entitled to the Market Value of his land based on its highest and best use as of the date of the filing of the petition which with a reasonable degree of certainty has a material affect on its value". Illinois Light & Power v. Bedard, 343 Ill. 618, 621; Forest Preserve v. Lehmann, 388 Ill. 416, 424; Crystal Lake Park v. Consumers Co., 313 Ill. 395, 402.

It is also quite true that if the evidence offered was for the purpose of illustrating a possible future or speculative use of the land and no proper foundation laid, its introduction would be incompetent. Forest Preserve Dist. v. Wallace, 299 Ill. 334, 339 (1906).

A check of the record fails to show any foundation upon the initial submission and refusal. The decision of the trial court was correct. We shall deal subsequently with the second submission of the exhibit which occurred near the end of the trial.

The defendants' next assertions may be considered together. The second assertion is that the court erred in sustaining objections to the questions put to two of the defendants' witnesses as to the highest and best use of the land and to the offers of proof thereon. The third and final assertion of error that we shall consider is that the court erred to sustain objections to interrogation of defendant Range concerning his plans for planning or developing the tract for a lake site, and the offers of proof made thereon.

Because the above two assertions are to be controlled by the testimony, the foundation, if any, that was laid, and the trial court's discretion, the testimony will be set out at some length. The defendants' witness testifying in part.

First witness:

"as to my experience at the present time I am also engaged with Bartelso, Illinois. We are having about 108 lots that we are going to sell on the lake.

Mr. Schroeder: Object your Honor.

By the Court: Objection sustained as to development of lots thereon.

Q. Do not in your answer include any reference to lots. Tell us in general terms what your connection has been with this matter in Bartelso, Illinois, located in Clinton County.

A. To secure the site, to see to it that they are properly laid out.

Q. And when you say the site you mean the lake site?

Mr. Schroeder: Object your Honor.

By the Court: Objection sustained to the use of the word lots.

Q. What are the factors that you considered in determining the affect upon the value of the ground in this easement strip?

A. I had figures the basic would be -

By the Court: That isn't the question. Reporter read the question back.

Reporter: What are the factors that you considered in determining the affect upon the value of the ground in this easement strip?

A. The thing I was thinking about is the fact in addition to the easement there is land on both sides lost.

Mr. Schroeder: Object. It is not responsive and move to strike the answer.

By the Court: Objection is sustained only as to that part stating that there will be ground lost on either side.

Q. Eliminate any reference in your statement as to ground lost on either side, now tell us what the depreciation in value of the ground per acre as to the ground within the easement strip will be after the erection of the tower and the operation of the easement?

Mr. Schroeder: Object your Honor, there has been no foundation.

By the Court: Objection is sustained.

Q. It has been testified to in this case that the base of the tower at ground level, including the outside line of the caisson upon which the tower legs will rest, will be approximately 24 1/2 feet apart so -

Mr. Schroeder: Object, leading form.

By the Court: Sustained on leading form of the question on direct examination.

Q. In examining the petition filed by the petitioner in this case were you advised thereby from looking at it, as to the size of the tower base upon which the tower is to be erected?

A. Yes.

Q. Is that one of the factors that you included in arriving at your opinion as to the depreciation in value?

Mr. Schroeder: Objection. Leading.

By the Court: Objection sustained as to leading form of the question.

Q. State whether or not you did include the size of the tower base in your arriving at your opinion as to the depreciation in value on the easement strip?

Mr. Schroeder: Same objection.

By the Court: Objection sustained.

Q. Did you examine the 44.6 acre tract in addition to the part that is covered by the easement strip itself?

A. Yes.

Q. What is there located about one-third of the way across the strip from the west line of the strip to which your attention was attracted by your own capabilities?

A. Road.

Q. No the road is along the west side. What is there about the first third of the way across the strip to -

Mr. Schroeder: Object, leading.

By the Court: Sustained.

Q. Is there anything over here which you saw which would influence your opinion as to the value of this strip for any purpose?

Mr. Schroeder: Same objection.

By the Court: Objection sustained.

Q. What did you see, if anything, on this strip that would indicate any other use to you of this ground?

Mr. Schroeder: Object, leading form.

By the Court: Sustained.

Q. Did you see anything on there?

A. I seen a farm.

Q. I will ask you what in your opinion is the highest and best use of this tract of ground as of January 7, 1969 which with a reasonable degree of certainty would have an effect upon its fair cash market value of that land at that time?

Mr. Schroeder: No foundation at all shown for any conclusion.

By the Court: Objection is sustained.

Q. If there a lake site on this property?

Mr. Schroeder: Objection.

By the Court: Objection is sustained."

The second witness then testified in part.

"I examined the 44.6 acre tract for the purpose of determining the highest and best use for it as of January 7, 1969, and have an opinion in my judgment which with a reasonable certainty would effect the market value of the tract.

Mr. Baltz: What in your judgment is that highest and best use?

Mr. Schroeder: Object, no foundation shown for that question, no showing this witness is qualified to answer.

By the Court: Objection sustained.

Mr. Baltz: What in your opinion, based upon your experience and judgment, is that highest and best use?

Mr. Schroeder: Same objection.

By the Court: Objection sustained."

The testimony of the defendant in part:

"I talked to a man by the name of Grover Carr before ever I had contact with Illinois Power as to this easement.

Mr. Schroeder: Object to that.

(In Chambers.)

Mr. Baltz: The witness' purpose in seeing Mr. Carr was to discuss with him the establishment of a lake on the 44.6 acre tract.

Mr. Schroeder: Objected to for the reason that plans contemplated by the owner have no bearing on the fair cash market value. There is nothing there now and is merely an attempt to build up and inflate speculative plan, in order to show enhancement.

By the Court: I have taken it as an offer of proof.

Mr. Baltz: I made it as an offer of proof.

Mr. Schroeder: Object to offer of proof.

Mr. Baltz: Offered as corroborative of subsequent testimony of qualified witnesses that area has a use for a lake site ---- highest and best use having reasonable certainty affect upon market value of property on January 7, 1969.

By the Court: Offer of proof having been made, Objection herewith sustained.

The defendants are quite correct when they state that neither party in a condemnation suit is bound by the other party's theory of the highest and best use of the land taken and each is allowed to introduce evidence on its own theory. See *Cook v. Holland*, 3 Ill. (2d) 36, 41; *Crystal Lake Park District v. Consumers*, 313 Ill. 395, 401; *Union Electric v. Sauget*, 1 Ill. (2d) 125, 130; *Peoples Gas Light & Coke Co. v. Buckles*, 24 Ill. (2d) 520, 531.

It is also true however that a witness must state the factors or elements which are the basis of his theory. The Law is thus stated in the following quotation from *County of Cook v. Holland*, supra.

" . . . It cannot be construed to mean that a witness is qualified to state his opinion without some preliminary showing being made as to the matters upon which he has based his opinion. At the time that the witness Manahl was asked his opinion as to the highest and best use of the subject property, he had testified merely as to his experience in the quarry business and that he had known this property for about eight years. He at no time described the property or stated in what respects he was familiar with it or testified to any matters establishing a foundation for his opinion. The mere fact that he had been engaged in the quarry business for a long period of time did not place him in a position in which he could state the value of the subject property without stating the reasons why he so valued it. And the fact that there was a large quarry in operation in the immediate vicinity of this property did not of itself establish the property to be condemned as useful for quarrying purposes. *Forest Preserve Dist. v. Caraher*, 299 Ill. 11, 15.) Certainly, more must be required of a witness than the categorical statement that he is familiar with the property before he will be permitted to testify as to value, and this is especially so in a case such as this where an effort is being made to prove that the land is adaptable to a special use. We do not feel that the trial judge abused his discretionary powers in sustaining the objections to this witness's testimony." (Emphasis added.)

Nowhere in the record did the defendant's witnesses give any specific basis or element which they took into consideration. The witnesses' testimony lacked the proper foundation to be admissible.

Finally with regard to testimony of the defendant himself, we cannot say that

the trial court abused its discretion. To the point of the defendant's testimony there was no proper foundation that the land had any prospective use other than farming; thus the testimony which may well have included hearsay certainly dealt with a use of the land which was speculative. Forest Preserve Dist. v. Hahn, 341 Ill. 599 (1930). Further, the trial court was correct in refusing the final admission of defendants' Exhibit #1 as there was no proper foundation.

As we have decided the above adversely to the defendant-appellant, we do not discuss whether or not the defendant waived his objections to the court's decision by not objecting at the proper time to the instructions given the jury which did not provide for damages for the property not taken.

Judgment Affirmed.

CONCUR: GEORGE J. MORAN J

CONCUR: PAUL C. VERTICCHIO J

PUBLISH ABSTRACT ONLY



J. D. PULLEY,

Plaintiff-Appellee,

-vs-

MOSS-AMERICAN, INC., a Corporation,

Defendant-Appellant.

Appeal from the Circuit Court
of Alexander County.Honorable George Oros,
Judge Presiding.

George J. Moran, J.

Plaintiff, J. D. Pulley, brought this action to enjoin defendant, Moss-American, Inc., from operating its tie yard on the property adjoining plaintiff's as a nuisance and for damages. The trial court denied plaintiff's claim for damages but enjoined certain activities of defendant as to time and location and defendant appeals.

Plaintiff's complaint alleges that defendant has been lessee of certain property in McClure, Illinois, since February, 1969; that plaintiff has been the owner of a certain tract of land containing approximately .43 acres adjoining the southerly boundary of defendant's property upon which he has maintained for a large number of years two residential houses for himself and his family; that in February, 1969, defendant commenced the unloading and stacking of raw railroad ties in large and tall piles, and sawing, moving and cutting these ties upon defendant's land beginning at a point approximately fifteen feet from the front doors of plaintiff's houses; that these operations caused loud and offensive noises, strong vibrations caused by chain saws, trucks and lifts, noxious odors and large numbers of mosquitoes, insects and other pests, thereby endangering the health and life of plaintiff and his family and disturbing the peace and quiet and comfortable and reasonable use of his premises; that the operations have greatly diminished and damaged the value of his premises and that unless restrained, great irreparable damage will result for which plaintiff has no adequate remedy at law.



Defendant answered, denying the material allegations of the complaint and further answered that defendant's tie yard is located in an unincorporated village on railroad property adjacent to railroad tracks in a suitable and proper location; that defendant has operated the tie yard in a lawful, proper and reasonable manner without intent to cause injury and has used all available and practical means to avoid and prevent injury to persons and property in the area; that any injury to plaintiff or his family has been in the necessary and proper operation of the tie yard; and, that the injuries complained of have been insubstantial and trifling in character.

After a trial before the court without a jury, the trial court denied plaintiff's claim for damages and entered a modified decree for permanent injunction in part as follows:

(c) The stacking, maintaining and cutting of ties as aforesaid in the premises described in paragraph three (c) supra at any point closer than fifty feet from the residential house of the plaintiff, and the conduct of any of said tie operations thereon at any times other than between the hours of 6:00 a.m. and 6:00 p.m., constitutes a nuisance and prevents and denies to plaintiff and his family the reasonable, ordinary, peaceful and quiet use and enjoyment of his premises for residential purposes as aforesaid, and endangers their health and well-being, and should be permanently enjoined.

. . .

(d) That from and after 60 days from November 17, 1969, defendant Moss-American, Inc., its agents and employees, and all persons acting or claiming by, for, through or under it, and each of them be, and they hereby are perpetually restrained and enjoined from unloading, stacking, maintaining, and cutting ties, and operating saws, trucks and lifts in connection therewith, and from causing or permitting the same to be done, on the premises described in paragraph three (c) supra, at any point closer than fifty feet from either residential house of the plaintiff, and from unloading, stacking, and cutting ties, and operating saws, trucks and lifts in connection therewith upon the aforesaid premises leased by defendant, and from causing or permitting the same to be done, at any other time than between the hours of 6:00 a.m. and 6:00 p.m."

Defendant contends that equity should not bar the operation of a lawful business where the right to relief is doubtful and that plaintiff has failed to make a clear showing that he is entitled to injunctive relief. Equity is reluctant to exercise its jurisdiction to abate nuisances by injunction except in clear



cases and if the right to relief is doubtful, either as to the law or under the facts proved, equitable relief will not be granted. Klumpp v. Rhoads, 362 Ill 412; Bauman v. Piser Undertakers Company, 34 Ill App 2d 145; Flood v. Consumers Company, 105 Ill App 559.

It is important to note in this case that the trial court permitted defendant to continue its operation from 6:00 a.m. until 6:00 p.m., daily, and on all of its property except that within fifty feet of plaintiff's door and denied plaintiff's claim for money damages. Therefore, that portion of the order which restrains defendant's activity, that is from 6:00 p.m. until 6:00 a.m., and within fifty feet of plaintiff's door at all times must be supported by clear evidence of a substantial and unreasonable interference with the use of plaintiff's property in order to be sustained.

The evidence discloses that plaintiff owned the only two residences in the area which was otherwise surrounded by a railroad track with two switch tracks, another tie yard operation, a granary, and other trucking facilities, and a restaurant; that defendant's employees were cutting and stacking ties and loading them on cars during eleven days in nine months of operation; that the chain saw was operated only one hour on each of these days; that the fork lift used was muffled and sounded like any other tractor; that this cutting and stacking operation was conducted only between 9:00 a.m. and 4:30 p.m., using three or four workmen; that truckloads of ties were unloaded on only a few occasions after 6:00 p.m., and this operation consisted only of unloading and stacking the ties; that there was no debris or any substance cast upon the plaintiff's premises; that there was no loss of value to plaintiff's premises or physical injury to plaintiff or his family; that the odor, if any, was only that of green wood and its effect was conflicting according to the witnesses; and, that there was no infestation of rodents or mosquitoes caused by defendant's operation.

In our opinion, plaintiff has failed to establish the material allegations of his complaint and his right to injunctive relief. Accordingly, the judgment



of the Circuit Court of Alexander County is reversed.

Judgment reversed.

CONCUR:

Honorable Edward C. Eberspacher

Honorable Joseph J. Barr

PUBLISH ABSTRACT ONLY.



131 ILL. APP. 2 1070.

No. 70-74

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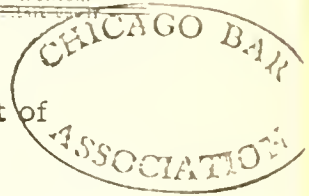
APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

APR 27 1971

FILED

Walter T. Simmons
FIFTH DISTRICT OF ILLINOIS
CLERK OF THE APPELLATE COURT



DENNIS RAY MELVIN,

Plaintiff-Appellee,

-vs-

CHARLOTTE KAY MELVIN,

Defendant-Appellant.

)
)
) Appeal from the Circuit Court of
) Perry County, Illinois.
)
)
)

)
) Honorable Robert Bastien,
) Associate Judge Presiding.
)
)
)

George J. Moran, J.

This is an appeal from an order of the Circuit Court of Perry County modifying the child custody provisions of a decree of divorce and dismissing defendant's petition to show cause why plaintiff is not in contempt of court for refusing to pay child support.

On July 8, 1969 plaintiff-appellee, Dennis Ray Melvin, obtained a divorce from defendant-appellant, Charlotte Kay Melvin. Both parents were found to be fit and proper persons to have the custody of their child, Dennis Ray Melvin, Jr., eight months old, and the decree awarded custody to defendant with week-end visitation privileges to plaintiff who was required to pay \$8.00 per week for the support of the child. On October 29, 1969 plaintiff filed a petition for modification of the custody provision based on changed circumstances. Defendant's motion to dismiss was denied. She then filed an answer, an affirmative defense, a counter-petition for modification of the decree seeking visitation privileges for plaintiff only in her home and a rule to show cause why plaintiff should not be in contempt of court for failure to pay an arrearage of \$192.00 in child support. These pleadings were consolidated for hearing and defendant's motion for judgment on the pleadings was denied. After a hearing the trial court entered the following order:

"1. That it has jurisdiction over the parties hereto and subject matter hereof.

2. That circumstances have changed since the entry of the decree of divorce herein with respect to the provisions contained therein providing for custody and visitation rights and with respect to those rights finds the equities to be with the plaintiff.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED:

1. That the decree of divorce heretofore entered on July 8, 1969, be and the same is hereby modified as follows:

A. That defendant, Charlotte Kay Melvin, shall retain custody of the minor child, Dennis Ray Melvin, Jr., subject to the following rights of temporary custody and visitation in plaintiff, Dennis Ray Melvin.

B. Plaintiff shall have temporary custody each month commencing the first (1st) Friday thereof at the hour of 6:00 p.m., and continue until 6:00 p.m. on the second (2nd) Sunday following the first Friday.

C. The parties shall alternate custody of the minor child on the following holidays, Easter, Thanksgiving, and Christmas; provided, however, that when plaintiff is entitled to custody on Thanksgiving, his custody shall commence on the Tuesday before Thanksgiving at 6:00 p.m. and continue through to the 2nd Sunday following the first Friday in December, at 6:00 p.m.; Provided, further, when plaintiff is entitled to custody at Christmas, his custody shall commence December 23, at 6:00 p.m. Also, provided, if plaintiff is entitled to custody on Easter and that holiday falls at the end of March or first of April, then in such event, plaintiff shall have custody commencing at 6:00 p.m. nine (9) days before Easter Sunday and continue until 6:00 p.m. on the second (2nd) Sunday following the first (1st) Friday in April. These provisions are to take effect with Easter, 1970, with plaintiff entitled to custody commencing March 20 at 6:00 p.m.

D. Plaintiff shall pick up his child at the commencement of any of the above periods of custody and defendant shall pick up the child at the end of plaintiff's visitation period. However, should plaintiff be delayed in his effort to pick up the child, such delay not to exceed 48 hours, he shall notify defendant thereof and state to her when he shall pick the child up. Such notice, if by mail, shall be postmarked not less than 72 hours before the regular time for plaintiff's custody; such notice, if by telephone, shall be communicated not less than 24 hours before plaintiff's regular custody would commence. Delay shall not extend plaintiff's period of custody.

E. Plaintiff shall have custody of the minor child for forty (40) consecutive days during the summer months of each year falling between June 1 and September 30. The parties shall agree on the period, if they cannot, plaintiff shall determine the period by notifying defendant by mail not less than 45 days prior to the date such summer custody is demanded. Plaintiff shall not be liable to pay support during the 40-day summer custody, nor shall he have the 9-day custody period during this time.

F. Should defendant refuse for any reason to deliver to plaintiff the minor child under the terms provided herein, then plaintiff shall be relieved of all child support payments.

G. Defendant shall not keep the child in her mother's home in Elkhville, temporarily or permanently for more than 72 hours, should she for any reason need to stay longer than 72 hours, then she shall deliver the child to plaintiff until her stay has ended, then she shall be entitled to take the child with her and plaintiff shall surrender possession of the child to defendant.



H. During the time plaintiff has custody of the minor child during his 9-day custody period or during his holiday custody period he shall not be liable to pay support.

2. That plaintiff is not in contempt of court for refusing to pay child support, and the defendant's petition to show cause is dismissed.

3. Each party hereto shall bear his own costs."

The policy in the courts of Illinois has been well established that the interests of a child of tender years are better served if his care and custody is entrusted to his mother provided she is a fit and proper person. *Nye v. Nye*, 411 Ill 408; *Bulander v. Bulander*, 23 Ill App 2d 299. The necessary inference from the order of modification is that defendant has continued to be a fit and proper person to retain custody of the child. There was no evidence that the child was ill-nurtured or neglected and the testimony regarding the cleanliness of the child was conflicting. Plaintiff admitted that the child's health was pretty good and its paternal grandmother testified that the child was playful and was "all right," and that there was nothing unusual about a one year old occasionally being dirty. Furthermore, there was no evidence that the child's environment had changed since the entry of the original divorce decree. The child had been left with the maternal grandmother for a period of two weeks while defendant went north to look for a job, but this condition was only temporary and the evidence shows that defendant has remarried and established a new and satisfactory family relationship in which the child will be raised. In all matters concerning the custody of children, the paramount issue is their welfare, and only changed conditions which affect the welfare of the child are sufficient to warrant modification of the custody provisions of the decree. *Eggemeyer v. Eggemeyer*, 86 Ill App 2d 224. Clearly, such a change of conditions was not shown in this case.

Furthermore, we believe the expansion of visitation and temporary custody rights of the plaintiff was unwarranted and improper. The modified decree essentially provides for alternate temporary custody in each of the parents. We believe that one of the absolute conditions required for a child's welfare is a stable existence particularly for a child of tender age and we concur with *Bulander v. Bulander*, supra, wherein it was stated:



"A child's welfare is at stake, and nothing is more injurious to that welfare than to have a child shuttled between contesting parents."

Certainly, the parent who is a fit and proper person who does not have custody is entitled to visitation rights, but such rights should be limited so that the child will be able to maintain a stable life.

We also believe that that portion of the order prohibiting defendant from keeping the child in the maternal grandmother's home in Elkhaville temporarily or permanently for more than 72 hours is an unreasonable abridgement of defendant's custody rights. There is no evidence in the record which would support a finding that maintenance of the child in the maternal grandmother's home for more or less than 72 hours was injurious to the child's welfare.

Furthermore, we believe that that portion of the order relieving plaintiff of his duty to make child support payments in the event defendant refuses to deliver the child for visitation purposes is improper. The duty of a father to support his minor child if he is able to do so is absolute and is entirely unrelated to his relationship with the natural mother. It cannot be conditioned upon the mother's delivery of the child to its father in accordance with his visitation rights. *Kemp v. Kemp*, 332 Ill App 432. Plaintiff has obvious remedies through legal process to enforce his rights as does defendant.

Finally, the trial court dismissed defendant's petition to show cause why plaintiff should not be in contempt of court for refusing to pay \$192.00 in arrearages of child support. Plaintiff testified that he made \$108.00 per week and had worked every day since he had been married. He lived in a trailer on a lot next to his mother's home and she cared for his everyday needs. It appears that he made payments only on the weeks when the child was available for visitation. Under these circumstances we believe this portion of the order should be reversed and remanded for a hearing to permit plaintiff to show cause why he should not be held in contempt of court for failure to make the required payments.

In view of this result, it is unnecessary for us to consider defendant's contentions that her motions to dismiss and for judgment on the pleadings should have been granted.



Accordingly, the order of the Circuit Court of Perry County is reversed. This case is remanded with directions that the circuit court deny plaintiff's petition for modification of the decree, allow defendant's petition to show cause, and grant defendant's petition to modify the decree to grant full custody of the minor child to the defendant with reasonable visitation to plaintiff to be determined as the court may deem to be presently for the best interest and welfare of the child and convenience of the parties and in conformance with the views expressed in this opinion.

Reversed and remanded
with directions.

CONCUR:

Honorable Edward C. Eberspacher

Honorable Charles E. Jones

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INDIANA

